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No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1932

FRANK COOK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 62–79) is reported in 51 F. (2d) 292. That of the Circuit Court of Appeals (R. 95–106) is reported in 56 F. (2d) 921.

JURISDICTION

The final decree of the Circuit Court of Appeals was entered March 18, 1932 (R. 106–107). A petition for a writ of certiorari was filed May 16, 1932, and granted on October 10, 1932. (R. 107.) Jurisdiction is conferred upon this Court by Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Was the question whether the seizure of the vessel was made in violation of the Treaty of 1924 with Great Britain material in the forfeiture proceedings; and if so, was the objection to legality of the seizure waived by petitioner?

2. Did the Treaty of 1924 limit the right of the United States to seize British vessels under its laws prohibiting the importation of alcoholic beverages to those seized within one hour's sailing distance from the coast?

STATUTES AND TREATY INVOLVED

The pertinent provisions of the Tariff Act of 1930 and of the Treaty with Great Britain of May 22, 1924, are printed in Appendices A and B, *infra*, pages 54–61.

STATEMENT

Two libels of information in admiralty were filed by the United States in the District Court for the District of Rhode Island. The first (R. 1–5) was directed against the British Motor Screw *Mazel Tov,* and alleged that on the 1st day of November, 1930, the vessel was bound to the United States; that it had committed an offense against the laws of the United States prohibiting the importation of alcoholic beverages by conveying alcoholic liquors to the United States by itself and by vessels

other than itself, its speed and the speed of such other vessels being such that it and they could reach the coast of the United States by traversing the distance from the *Mazel Tov* to the coast within one hour; that on the 1st day of November, at a point about 9⅞ miles from the coast of Massachusetts, it was seized by the Commander of the United States Coast Guard Destroyer *Tucker,* who thereafter turned the vessel over to the Collector of Customs at the Port of Providence in the District of Rhode Island; and that before the filing of the libel the Collector had adopted the seizure and was then holding the vessel as forfeited to the United States for penalties imposed by Sections 584 and 585 of the Tariff Act of 1930. (*Infra,* pp. 55–57.)

The libel then set forth three causes for penalties. The first two were pleaded under Section 584 of the Tariff Act of 1930 (*infra,* p. 55), and the third under Section 585 of that Act (*infra,* p. 56). Violations of these sections subject the master of a vessel to certain penalties for the payment of which the vessel may be seized and proceeded against by libel, as provided in Section 594 of the Tariff Act of 1930 (*infra,* p. 57). The first cause for penalty alleged that the master had failed to produce a manifest when requested to do so by the Commander of the Coast Guard Destroyer; the second alleged that there was found on board of the vessel a cargo of distilled spirits not appearing on the manifest; and the third alleged that the vessel arrived from

a foreign port or place within the limits of a collection district and attempted to depart therefrom after having unloaded merchandise without making a report or entry under the provisions of the Tariff Act of 1930, the departure not being caused by stress of weather or other necessity.

The second libel was in all respects similar to the first except that it sought forfeiture of the unmanifested cargo of liquor pursuant to Section 584 of the Tariff Act of 1930. (R. 6–8.)

In accordance with the prayers of the libel, warrants and monitions issued in each case directing the United States Marshal to attach the vessel and cargo, to detain the same in his custody, and to give due notice to all persons claiming the vessel and cargo to show cause why the same should not be condemned and forfeited. (R. 8–11.) The return of the marshal upon each warrant and monition alleged that he had complied with the directions contained therein. (R. 9, 11.) A claim to the vessel was filed on behalf of the owner of the vessel by petitioner herein, who alleged that he was master and bailee thereof. This claim prayed that the owner of the vessel be permitted to appear and defend the action, and that the vessel, pursuant to the desire of the owner, be released on bond. (R. 11–12.) The record does not show that the owner ever otherwise appeared in the case. Following this claim appears an answer by petitioner which, after denying most of the allegations in the ship libel, contained the following paragraph (R. 14):

> The exception of Frank Cook, claimant of the British Motorship *Mazel Tov* in the above-entitled cause respectfully shows that said vessel was not seized within the territorial limits of any jurisdiction of the United States, but, on the contrary, was captured and boarded at a point more than four (4) leagues from the coast of the United States, and was not seized on any of the waters of the United States or within any collection district of the United States as alleged in said libel, and it was not the intention at any time to enter any of the territorial limits of the United States and that therefore this court has no jurisdiction sitting in admiralty in this matter.

A similar claim does not appear in the record in connection with the cargo, but the record does contain an answer which alleged that petitioner was consignee and claimant of the cargo, and which in every material respect was similar to that filed in response to the ship libel. (R. 14–16.) The two causes were consolidated for hearing, an oral motion was made by the claimant to dismiss the libels (R. 16), and testimony was taken (R. 16–61).

From the facts found by the District Court, as contained in its opinion and in separate findings of fact (R. 63–64, 85, 90), it appears that the British Motor Screw *Mazel Tov,* was discovered by the Coast Guard Destroyer *Tucker* within the four-league limit off the coast of Massachusetts on the evening of November 1, 1930. There was neither

proof nor finding as to the nationality of the owners of stock in the Mazel Tov Shipping Co., Ltd., the registered owner of the *Mazel Tov*. She was stopped and boarded by officers of the Destroyer at a point 11½ miles from the nearest land. The District Court found that the speed of the vessel was insufficient to propel her from the point of boarding to the shores of this country within an hour's sailing time. Upon demand the master of the *Mazel Tov* produced to the boarding officers a paper which the court found to be a manifest, but the officers discovered on board the vessel unmanifested liquor valued at $14,286.18, which had previously been cleared from St. Pierre. While the court found that the master of the vessel did not intend to approach nearer than four leagues to the coast of the United States, and that there was no evidence that it had either been in communication with our shores or had unladen any part of its cargo, the court said that the "circumstances compel the conclusion that the vessel was cruising about off our coast with the intent on the part of the master that ultimately the cargo would be taken to the United States by other boats." The vessel was seized and taken by the boarding officers to the Port of Providence, where she was turned over to the custom officials together with her cargo. Thereafter she was appraised and the master was notified that he had become liable to the penalties provided in Sections 584 and 585 of the Tariff Act of 1930.

In its decrees (R. 79, 81) the court dismissed both libels on the ground, as stated in its opinion (R. 62–79), that the seizure of the vessel and its cargo was in contravention of Section 3 of Article II of the Treaty with Great Britain of May 22, 1924. (See *infra*, p. 59.)

The United States appealed the cases to the Circuit Court of Appeals for the First Circuit, where they were consolidated for hearing. (R. 84–85.) That court reversed the decrees below and remanded the cases for further proceedings. (R. 95–100.) As to the validity of the seizure, the court held that the treaty did not in any way modify or abrogate the provisions of Section 581 of the Tariff Act of 1930, and therefore that the seizure was valid.

In passing upon the specific causes for penalty, the court sustained that alleged in the cargo libel and also the cause in the ship libel based upon the presence on the vessel of unmanifested cargo. No question was raised by the Government as to the cause for penalty based upon the failure of the master to produce a manifest, and the United States has not sought review of the adverse decision of the Circuit Court of Appeals in reference to the cause asserting a penalty against the vessel for departing from a collection district without report or entry. Accordingly, the only two causes before this Court are the causes relating to the possession of unmanifested cargo (the second cause stated in the ship libel and the single cause of the cargo libel).

SUMMARY OF ARGUMENT

I

Since, under authorities cited, a valid seizure is not a prerequisite to admiralty jurisdiction where the vessel has been seized on the high seas and brought within the jurisdiction of a District Court of the United States, the District Court in this case had jurisdiction of the proceedings brought to enforce the penalties and forfeiture against the vessel and its cargo. Accordingly, the question whether the seizure was proper under the Treaty of 1924 is immaterial.

Furthermore, if the validity of the seizure under the Treaty was material, that question was, like the question of venue, waived by the petitioner's failure to raise it properly.

II

Assuming that the question of validity of seizure under the Treaty was material and was properly raised in the District Court, there are three divergent views of the effect of the Treaty with Great Britain which are presented for the consideration of the Court.

(a) The court below held that the Treaty did not affect the provisions of the Tariff Acts of 1922 and 1930 because it referred only to laws prohibiting the importation of alcoholic beverages and the provisions of the Tariff Acts in question were not within that category.

(b) The Department of Justice has considered the Treaty of 1924 to be a limitation upon the right to search and seize vessels under the provisions of the Tariff Act of 1922. Its interpretation of the Treaty has relied primarily on the provisions of Section 3 of Article II. It has not regarded the reenactment of the pertinent provisions of the Tariff Act of 1922 in the Tariff Act of 1930 as affecting the limitation of the Treaty.

(c) Other lawyers for the Government contend that the result reached by the court below was correct. They assert that prior to the Treaty the United States was insisting upon its right to exercise authority upon vessels engaged in smuggling liquor within twelve miles of the coast and that Great Britain was insisting that her vessels outside of territorial waters but within the twelve mile limit were not subject to the authority of the United States. It is argued that neither the United States nor Great Britain surrendered claims of sovereign right in the Treaty and that Great Britain merely waived its right to protest seizures beyond the three mile limit in a limited class of cases in return for which her vessels were permitted to transport intoxicating liquors within territorial waters. The right of the United States to proceed under municipal legislation therefore remains unaffected by the Treaty. Reenactment of the provisions of the Tariff Act of 1922 in the Tariff Act of 1930 shows that this view is correct.

This construction of the Treaty is desirable in order to foster the making of such agreements in the interest of peace and to promote the orderly development of international law. Any other construction is unworkable and apparently one-sided. The right asserted by the United States prior to the Treaty is recognized by many authorities, and various authorities support the construction of the Treaty which is urged.

ARGUMENT

I

Petitioner contends that the vessel and its cargo were not subject to forfeiture because they were seized in violation of the Treaty of 1924 with Great Britain. This raises two preliminary questions, (1) whether a valid seizure was prerequisite to the decrees of forfeiture, and (2) if it was, whether the point was waived because not raised by petitioner prior to the filing of petitioner's answers on the merits in the trial court.

Under Section 24 of the Judicial Code, paragraphs 3 and 9 (U. S. C., Title 28, Sec. 41), the District Courts of the United States have original jurisdiction "Of all civil causes of admiralty and maritime jurisdiction," with certain exceptions not here material, and "Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States." Section 256 of the Judicial Code (U. S. C., Title 28, Sec. 371) makes this jurisdiction exclusive. It is

evident that the District Courts have jurisdiction of cases falling within these categories because of the nature or subject matter of the proceeding. See *United States* v. *Larkin*, 208 U. S. 333. Venue is defined by Section 45 of the Judicial Code (U. S. C., Title 28, Sec. 106), which provides that "Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided."

Under these and similar earlier statutes it has long been held that a libel for forfeiture must allege a seizure which has not been abandoned but that the seizure need not be valid to sustain the jurisdiction. See *The Richmond*, 9 Cranch 102; *The Ann*, 9 Cranch 289, 291; *Gelston* v. *Hoyt*, 3 Wheat. 246, 310; *The Merino*, 9 Wheat. 390, 402–403; *Wood* v. *United States*, 16 Pet. 342, 359; *Taylor* v. *United States*, 3 How. 197, 205, 206; *Dodge* v. *United States*, 272 U. S. 530. See also *Strong* v. *United States*, 46 F. (2d) 257, 260–261 (C. C. A. 1st), dismissed pursuant to stipulation, 284 U. S. 691; *The Conejo*, 16 F. (2d) 264, 265 (C. C. A. 1st); *The Underwriter*, 13 F. (2d) 433, 434 (C. C. A. 2d), affirmed on other grounds *sub nom. Maul* v. *United States*, 274 U. S. 501; *The Rosalie M.*, 12 F. (2d) 970, 971 (C. C. A. 5th); *United States* v. *Story*, 294 Fed. 517, 519 (C. C. A. 5th).

As indicated by the above decisions, there are two reasons for this—the question concerns the venue; and the United States by filing its libel for forfeiture may ratify what would otherwise have been an illegal seizure. Now, it is clear that the Treaty with Great Britain did not in any way change or modify any law of the United States prescribing penalties and forfeitures. It related merely to the arrest of persons and the seizure of property suspected of offending against the laws designed to prevent the smuggling into this country of intoxicating liquor. (*Ford* v. *United States*, 273 U. S. 593.) The seizure, if contrary to the Treaty, could not relieve the District Court of the duty to determine whether the *res* had offended against a law of the United States and to condemn the *res* as forfeited. That the Government made out a case for forfeiture under the provisions of the Tariff Act of 1930 does not seem to be disputed. We submit, therefore, that the alleged illegality of the seizure presented no obstacle to the decrees condemning the vessel and its cargo as forfeited.

As we have indicated, causes for the penalties incurred which were enforcible against the vessel and the forfeiture of her unmanifested cargo are matters quite distinct from the validity of her seizure. The penalties and forfeiture were incurred and the vessel was seized upon the high seas. She was brought into Providence and libeled in the District Court for the District of Rhode Island. The District Court therefore had jurisdiction of

the proceedings brought to enforce the penalties and the forfeiture. The claimant appeared generally and did not question the court's jurisdiction or reserve any rights under the Treaty to object on the ground that the vessel and her cargo were not properly subject to the jurisdiction of the court. Instead of questioning the power of the court to consider the causes of penalties and forfeiture alleged in the libels the claimant filed answers which made defense upon the merits of the case. By so doing, it would seem that he waived the right, if any was afforded to him under the Treaty, to object that the court was without jurisdiction to enforce the penalties against the vessel and forfeit her cargo in accordance with the statutory mandate. See *The Merino,* 9 Wheat. 390, 400–401, *supra; Taylor* v. *United States,* 3 How. 197, 205, *supra; Ford* v. *United States, supra,* p. 606; *The Idaho,* 29 Fed. 187, 192 (Ore.); *The Lewellen,* Fed. Cas. 8307 (Ind.); *The Abby,* Fed. Cas. No. 14 (Mass.).

The fact that the Government's libels alleged that the *Mazel Tov,* on the date of seizure, was committing or attempting to commit an offense against the United States within the distance from shore specified in the Treaty did not save the question for petitioners. There was no allegation that the vessel was *seized* within the Treaty limit. Nor did the petitioner save the question by the exception set forth in his answers. In neither case was any infringement of Treaty rights complained of, the point made in each case being that the libeled prop-

erty "was not seized within the territorial limits of any jurisdiction of the United States, but, on the contrary, was captured and boarded at a point more than four (4) leagues from the coast of the United States."

II

If the question of the legality of the seizure of the *Mazel Tov* is material and was properly raised in the District Court, it becomes necessary to consider the effect of the Treaty of 1924 between the United States and Great Britain (see Appendix B, *infra,* p. 58) upon the provisions of the Tariff Act of 1922, and the effect of the Tariff Act of 1930 upon the Treaty. There are at least three possible and divergent views of the relation between the Treaty of 1924 and the customs provisions of the Tariff Acts. As the question is of international importance, we shall endeavor to state these divergent views fully and fairly and submit the question to the Court for its determination. Before doing so a brief review of the background of the Tariff Acts and the Treaty may prove helpful.[1]

Since the Act of August 4, 1790, 1 Stat. 145, Congress has granted authority to board and search foreign as well as American inbound vessels within four leagues of the coast of the United States.

[1] Negotiations and diplomatic correspondence preceding a treaty may be considered in determining the object of the parties. See *United States* v. *Texas*, 162 U. S. 1, 29; *Oklahoma* v. *Texas*, 260 U. S. 606.

(See *Maul* v. *United States*, 274 U. S. 501, concurring opinion of Mr. Justice Brandeis, p. 521.) Authority to seize foreign vessels beyond the territorial limits of the United States for violation of its laws was not in terms conferred until the Tariff Act of 1922 in respect to any offense, except in a few instances in which Congress pursuant to specific treaties provided that any vessel, foreign or American, might be seized.[2] (See *Maul* v. *United States, supra*, p. 507 and p. 521.)

Section 581 of the Tariff Act of 1922, 42 Stat. 858, 979 (see Appendix A, *infra*, p. 54), continued the right of search and authorized the seizure of any vessel within four leagues of the coast for violation of any law of the United States which subjected the vessel or its cargo to forfeiture. While the committee reports throw no light upon the reason for the extension of the right to seize beyond territorial waters, the debates indicate that the purpose of the change was to facilitate enforcement of the National Prohibition Act. (See Congressional Record, Vol. 62, Part 11, 67th Cong., 2d Sess., p. 11593.)

On June 26, 1922, the Secretary of State addressed a note to the British Ambassador suggesting cooperation on the part of British and Ameri-

[2] Various statutes authorizing the search and seizure of vessels are discussed in *Maul* v. *United States, supra*. Although the Court was there considering the right to search and seize American vessels, apparently no distinction is made in these enactments expressly excluding foreign vessels from their terms.

can authorities with regard to the smuggling of liquor. The serious difficulties of enforcement of the laws of the United States upon this subject were outlined, and the note concluded as follows (see Appendix C, *infra*, p. 62):

> While existing nefarious practices might be largely stopped by appropriate precautionary measures with respect to the issuance of British registries to vessels engaged in smuggling and with respect to the issuance of clearance papers to such vessels, the situation with which the authorities of this Government are confronted has become so serious that this Government feels prompted to inquire whether your Government would be disposed to enter into a treaty for the purpose of checking the illegal practices in question. Such a treaty might contain reciprocal provisions authorizing the authorities of each Government to exercise a right of search of vessels of the other beyond the three-mile limit of territorial waters to the extent of twelve miles from the shore. It would appear that no inconvenience would be experienced as a result of the exercise of such a right by vessels engaged in legitimate trade between Nassau and Halifax. It is evidently natural for such vessels to take a direct route to Hatteras and then a direct course to Diamond Shoal Lighthouse and from thence to Halifax. Apparently this course brings vessels at no point within four leagues of the American shore. I shall be glad if you will bring the contents of this communication to the attention of your Gov-

> ernment, which I have no doubt will appreciate the serious considerations which prompt the request that the matters therein presented receive earnest consideration at the earliest convenient time.

To this note the British Ambassador replied on October 13, 1922, outlining the steps already taken for cooperation with the American authorities in an attempt to prevent the smuggling of liquor, and concluding as follows (see Appendix D, *infra*, p. 68):

> His Majesty's Government had thus taken steps even before the receipt of representations from the United States Government to prevent the practices, to which attention has now been drawn. They have now, as already indicated, issued supplementary instructions in the matter, and hope that the measures taken will prove successful in preventing any breaches of the local law. They feel, however, more difficulty in accepting the proposal that a treaty should be made authorising the authorities of each government to exercise a right of search of vessels of the other beyond the three-mile limit of territorial waters up to a distance of twelve miles from the shore. His Majesty's Government have consistently opposed any extension of the limit of territorial waters such as that now suggested. They feel that the outbreak of smuggling which has led to the proposal can not be regarded as a permanent condition, but as one which will no doubt be sup-

pressed by the United States authorities within the not distant future. While, therefore, they are desirous of assisting the United States Government to the best of their ability in the suppression of the traffic and in the prevention of the abuse of the British flag by those engaged in it, they do not feel that they can properly acquiesce, in order to meet a temporary emergency, in the abandonment of a principle to which they attach great importance.

In communicating the above to you I am directed to add that while His Majesty's Government are, as already indicated, unable to acquiesce in the proposed treaty for the extension of territorial waters, they are nevertheless most desirous of taking any steps within their power to prevent any infractions of the local law by persons engaged in liquor smuggling.

Immediately following the enactment of the Tariff Act of 1922 and, perhaps in some few cases just before its enactment, British vessels had been seized by the United States beyond the three-mile limit. Protests were lodged by the British Government against these seizures, and a number of the vessels were released by direction of the American authorities.[3] Under date of November 9, 1922, the Secretary of the Treasury addressed a communication to the Collector of Customs at New York au-

[3] In a communication from the Secretary of State to the American Chargé d'Affaires ad interim in London, dated

thorizing the release of all foreign vessels seized outside the three-mile limit where the vessels were not communicating with the shore by means of their own boats or equipment. (See Pet. Br., pp. 15–16.)

On December 30, 1922, following the decision in *The Grace and Ruby,* 283 Fed. 475 (Mass.), decided September 18, 1922, the British Ambassador addressed a note to the Secretary of State (see Appendix E, *infra,* p. 72), concluding as follows:

> In order to avoid the possibility of any misunderstanding, I am desired by my Government to make it clear that His Majesty's Government are unable to acquiesce in what they understand to be the ruling of the United States Government, namely, that foreign vessels may be seized outside the three-mile limit if it can be shown that they have established contact with the shore for illegal purposes by means of their own small boats. My Government must reserve their right to lodge a protest in any individual case in which action may be taken by the United States Government under this ruling.

August 25, 1923, after referring to various authorities on international law, it was said with respect to these vessels:

"Although these statements furnished grounds for the contention that the seizure outside the three-mile limit of British ships engaged in smuggling liquor was proper, nevertheless this Government in the desire to avoid controversies with respect to cases of a doubtful character has acquiesced in requests submitted by the British Embassy for the release of certain British vessels."

To this note the Secretary of State replied on January 18, 1923, stating, in effect, that the conclusion had been reached that the Government of the United States should adhere to the position that foreign vessels outside the three-mile limit may be seized when it is established that they are using their small boats in illegal operations within the three-mile limit. (See Appendix F, *infra,* p. 74.)

On April 30, 1923, this Court decided *Cunard S. S. Co. Ltd.* v. *Mellon,* 262 U. S. 100, holding that the National Prohibition Act applied to all merchant vessels, foreign or domestic, within the territorial waters of the United States, and that the carrying of intoxicating liquors as sea stores through the territorial waters or into the ports and harbors of the United States by such vessels is forbidden by the Eighteenth Amendment and the National Prohibition Act.

Following the decision in *The Henry L. Marshall,* 286 Fed. 260 (S. D. N. Y.), affirmed 292 Fed. 486 (C. C. A. 2d), certiorari denied, 263 U. S. 712, on July 10, 1923, the British Chargé d'Affaires ad interim addressed a note to the Secretary of State (see Appendix G, *infra,* p. 76), concluding as follows:

> In order to avoid the possibility of any misunderstanding on the part of the United States Government as to His Majesty's Government's attitude in this matter I have the

> honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to inform you that any attempt on the part of the United States authorities to seize a British ship outside the three-mile limit would be regarded by His Majesty's Government as creating a very serious situation. In regard to the *Henry L. Marshall case,* I have been instructed to explain that the absence of a protest by His Majesty's Government against the condemnation of this vessel in no way implies any alteration in the views of His Majesty's Government with regard to the principle at stake, inasmuch as that vessel, owing to the circumstances in which she secured her British registry, was not recognized by His Majesty's Government as entitled to British registry. Consequently, His Majesty's Government have not felt called upon to assert the principle at stake on her behalf, since, as far as His Majesty's Government are concerned, the *Henry L. Marshall* remains an American vessel.

Previously, about June 11 or 12, 1923, a draft of a proposed treaty had been submitted to Great Britain (as well as to France, Italy, Japan, and Spain.) (See Appendix H, *infra,* p. 78.) This draft provided for searches and seizures within twelve geographical miles from the coasts of the parties, without, however, extending territorial waters. It also provided that articles the importa-

tion of which into the territories of either of the contracting parties are prohibited might be brought within the territorial waters as sea stores if properly sealed.

Under date of July 14, 1923, the British Chargé d'Affaires advised the Secretary of State that Lord Curzon, when questioned in Parliament, had stated that the British Government could not accept the proposed treaty. The memorandum in which this communication was contained also states (see Appendix I, *infra*, p. 81):

> In the opinion of Lord Curzon Mr. Hughes' proposed treaty would not provide for any immediate remedy for the present difficulties, seeing that it could not be ratified until Congress meets, when an amendment to the Volstead Act could equally well be introduced if the United States Government so desired. Moreover, even if the twelve-mile limit were accepted, cases would inevitably occur liable to cause serious friction between two countries, owing to the difficulty of deciding with any certainty the position of a limit usually out of sight of land, at any rate on the Atlantic coast.
>
> Lord Curzon adds that the Hovering Acts in the United Kingdom were entirely superseded by the Customs Consolidation Act, 1876, by which British municipal legislation is made to conform with international law.

Under date of July 16, 1923, the Secretary of State replied to the communication of the British

Chargé d'Affaires of July 10, 1923. (See Appendix J. *infra*, p. 83.) After referring to the decision of the Circuit Court of Appeals in the *Henry L. Marshall*, 292 Fed. 486, *supra*, the Secretary of State continued:

> The United States Circuit Court of Appeals concluded: (a) that there was an attempt to introduce all of the *Marshall's* cargo into the commerce of the United States, and that there was an actual introduction of a part of that cargo into that commerce; (b) that such attempt at introduction was by means of fraudulent practices, i. e., evasion of the provisions of the National Prohibition Act; (c) that there were wilful acts (i. e., rum running) by means whereof the United States was deprived of duties upon the merchandise (i. e., whiskey) affected by the said act.
>
> * * * * *
>
> In view of this decision, and of the tenor of your communication, my Government hopes that it may be advised that His Majesty's Government does not consider, even in the case of a vessel admittedly of valid British registry, that such a vessel pursuing the course of conduct followed by the schooner *Henry L. Marshall* is making proper use of the British flag and that His Majesty's Government would not be disposed to espouse the cause of a British merchant vessel in an effort unlawfully to introduce intoxicating

liquors into the territory of the United States in the manner adopted by the schooner *Henry L. Marshall*, or in such a case to oppose the enforcement of the laws of the United States by means of the procedure taken in the case of that vessel and judicially approved.

On July 19, 1923, the Secretary of State replied to the memorandum from the British Chargé d'Affaires dated July 14, 1923, suggesting further negotiation in connection with the proposed treaty. (See Appendix K, *infra*, p. 88.) In this note the Secretary of State said:

> It may confidently be asserted that there would be no disposition on the part of the American authorities, and the special agreement would not justify any attempt, to seize a British vessel, save within the limits proposed, and when it was clear that the vessel concerned was directly involved in an attempt to introduce its illicit cargo into the territory of the United States.[4] British vessels bound for the ports of the United States would encounter no additional obstacles to their trade, and vessels destined for foreign ports, which happened to pass on legitimate errands within twelve miles of the American coast, would suffer no incon-

[4] This statement was made when the limits of the proposed treaty were coextensive with the limits of the application of Section 581 of the Tariff Act of 1922. It had no reference to the provisions in the treaty as concluded.

venience, while such vessels as were engaged in the unlawful conduct above described would not be able to create difficulties between the two countries, much less serious friction, by attempts to secure immunity for their operations by invoking the protection of the British flag.

Although the Government of the United States regards the proposed agreement as an appropriate setting forth of the proposal, it would cordially welcome the cooperation of the British Government in moulding the form of an arrangement which would reasonably serve a purpose which, it is firmly believed, may be found to be common to both countries.

In reply to the note of July 19, 1923, the British Chargé d'Affaires ad interim advised the Secretary of State on September 17, 1923, in part as follows (see Appendix L, *infra*, p. 93):

In face of this authoritative pronouncement Lord Curzon feels additional hesitation in accepting proposals which, with all due respect to Mr. Hughes, can not, in Lord Curzon's opinion, fail to weaken the authority of the general rule of international law, whereby three miles is regarded as the limit of territorial jurisdiction. Moreover, the Atlantic coast line of the United States, except the small part between Portland [Maine] and the Bay of Fundy, is so low that it is not as a rule visible twelve miles

out at sea; the difficulty of deciding the exact position of the proposed new limit would in consequence be much increased, and there would be a constant risk of disputes arising between the two countries whenever a British ship was boarded or arrested by the United States preventive service, on or near the new line. In this connection Lord Curzon would observe that the ancient British Hovering Acts were modified in 1876 to bring them into harmony with the principles of international law, and His Majesty's Government can not admit that the municipal legislation of any country can override those principles.

* * * * *

His Majesty's Government do not deny the strictly legal right of the United States or any other country to impose its jurisdiction on all ships, whether national or foreign, within its territorial waters.

The British Chargé d'Affaires ad interim on October 29, 1923, advised the Secretary of State that the Imperial Conference had appointed a special committee to consider the question of prohibition and liquor smuggling through United States territorial waters and that on the conclusion of the Conference's consideration the British Government would be in a position to make a definite proposal to the Government of the United States generally favorable to their interest in the suppression of the

liquor traffic. This communication was acknowledged by the Secretary of State on November 2, 1923.

In a note dated November 23, 1923, the British Chargé d'Affaires ad interim referred to the decision of this Court in *Cunard S. S. Co., Ltd.*, v. *Mellon, supra,* and stated that before proceeding with a proposed treaty the British Government wished to have assurance that the provisions of the treaty authorizing the introduction of liquor as ships' stores within the territorial waters of the United States would be valid. (See Appendix M, *infra,* p. 99.)

On November 26, 1923, the Secretary of State replied, advising the British Government of the view of the Government of the United States that the treaty proposed was within the constitutional power of Congress. (See Appendix N, *infra,* p. 102.)

On December 3, 1923, the British Chargé d'Affaires ad interim left with the Secretary of State a draft of treaty, prepared by the British Government, which provided in Section 2 (2) that the right of search and seizure conferred should not be exercised at a greater distance from the coast of the United States than can be traversed in one hour by the suspected vessel. (See Appendix O, *infra,* p. 108.)

In an aide-memoire of December 7, 1923 (see Appendix P, *infra,* p. 111), prepared by the Secre-

tary of State and handed to the British Chargé d'Affaires, following submission of the draft of treaty proposed by the British Government, it is said:

> While the Government of the United States would have preferred that the distance for the purposes of search and seizure be more definitely delimited, it has been concluded, in view of the evident desire of the British Government to attain the object in view and of the importance of an early disposition of the matter, not to raise objections to the provisions contained in Articles 2, 4, and 5 of this draft, save to add the words ", its territories or possessions" after the words "United States" in Article 2.

The memorandum then makes certain suggestions for modification which are not material for present purposes.

Under date of January 2, 1924, the British Chargé d'Affaires ad interim addressed a communication to the Secretary of State in connection with the seizure of the *Tomoka* (see Appendix Q, *infra,* p. 115), and in the course of that communication the Secretary of State was asked for an authoritative statement as to the present policy of the United States with respect to seizure of foreign vessels outside of the three-mile limit, and the note also refers to the fact that the absence of a protest by the British Government in the case of the *Henry L. Marshall* (see *supra* p. 20) did not indicate acquiescence in seizure outside territorial waters.

The Secretary of State replied to this note on January 22, 1924 (see Appendix R, *infra*, p. 120). Before discussing the *Tomoka* case the Secretary of State referred to his note of July 16, 1923 (see *supra*, p. 22, and Appendix J, *infra*, p. 83), saying:

> It is far from my purpose to enter into a detailed review of the correspondence with your Embassy concerning the several cases of seizure which have arisen. I would merely advert briefly to certain facts which, it is believed, suffice to explain the position of my Government:
>
> First. I endeavored to state succinctly the principles on which my Government has asserted rights of seizure and condemnation in my note to your Embassy of July 16, last, concerning the case of the *Henry L. Marshall*.
>
> Secondly. The desire which I expressed in the last paragraph of that note for an indication of the disposition of His Majesty's Government as to the espousal of the cause of a British merchant vessel engaged in an effort unlawfully to introduce intoxicating liquors into the territory of the United States in the manner adopted by the schooner *Henry L. Marshall* has, as yet, met with no response on the part of His Majesty's Government.

The proposed treaty was signed on January 23, 1924, ratifications were exchanged, and the Treaty

was proclaimed by the President on May 22, 1924 (43 Stat. 1761).[5]

This Court referred to the Treaty in *Ford* v. *United States*, 273 U. S. 593, as follows (p. 609):

> The treaty indicates a considerate purpose on the part of Great Britain to discourage her merchant ships from taking part in the illicit importation of liquor into the United States, and the further purpose of securing without objection or seizure the transportation on her vessels, through the waters and in ports of the United States, of sealed sea stores and sealed cargoes of liquor for delivery at other destinations than the United States. The counterconsideration moving to the United States is the enlargement and a definite fixing of the zone of legitimate seizure of hovering British vessels seeking to defeat the laws against importation of liquor into this country from the sea. The treaty did not change the territorial juris-

[5] Similar treaties were negotiated with other countries as follows:

Foreign government	Effective date	Where found
Norway	July 2, 1924	43 Stat. 1772.
Denmark	July 25, 1924	43 Stat. 1800.
Germany	August 11, 1924	43 Stat. 1815.
Sweden	August 18, 1924	43 Stat. 1830.
Italy	October 22, 1924	43 Stat. 1844.
Panama	January 19, 1925	43 Stat. 1875.
Netherlands	April 8, 1925	44 Stat. 2013.
Cuba	June 19, 1926	44 Stat. 2395.
Spain	November 17, 1926	44 Stat. 2465.
France	March 12, 1927	45 Stat. 2403.
Belgium	January 11, 1928	45 Stat. 2456.
Greece	February 18, 1929	45 Stat. 2736.
Japan	January 16, 1930	46 Stat. 2448.
Poland	August 8, 1930	46 Stat. 2773.
Chile	November 26, 1930	46 Stat. 2852.

> diction of the United States to try offenses against its importation laws. That remained exactly as it was.

The Tariff Act of 1930, 46 Stat. 590, in Section 581 reenacted verbatim Section 581 of the Tariff Act of 1922. See Appendix A, *infra*, p. 54.) There is no reference in the committee reports or the debates to the Treaty of 1924.

We are informed by the Department of State that no protest or claim of immunity has been filed by the British or Canadian Governments in connection with the seizure of the *Mazel Tov*.

A

The Circuit Court of Appeals, in reversing the decision of the District Court, held that the Treaty of 1924 did not repeal or abrogate the clause fixing a four-league zone in the Federal customs and revenue laws, and, therefore, that the validity of the seizure of the *Mazel Tov* beyond the treaty limits but within four leagues of the coast was not affected by the provisions of the Treaty. In this connection the court below said (R. 103):

> There is nothing in Article II or its subdivisions showing that the United States was undertaking to acquire any right or privilege as to the enforcement of its customs-revenue laws as exemplified in Sections 581 and 584 of the Tariff Act of 1922, which are

the same as the like numbered sections in the Tariff Act of 1930, and contain provisions such as have been a part of every tariff act passed by Congress beginning with the Act of 1790 (1 Stat. 145), which introduced the four-league limit (s. 31, p. 164) of the British hovering statutes. See 9 George 2d, C. A. P. 35 (1736); *Arch* v. *United States,* 13 F. (2d) 382. Neither the Tariff Act of 1922 nor of 1930 prohibits the importation of alcoholic beverages. Sections 581 and 584 clearly do not prohibit their importation and consequently it can not reasonably be said that the High Contracting Parties in Article II of the treaty were undertaking to or did there stipulate with reference to our customs revenue laws, and particularly Sections 581 and 584 containing provisions which had been embraced in the customs-revenue statutes of this government since its foundation and which did not prohibit importation of alcoholic liquors. *Gilliam* v. *United States,* 27 Fed. (2d) 296, 300, 301; *Miller* v. *United States,* 49 Fed. (2d) 368, 369; certiorari denied in 283 U. S. 866.

The fact that Congress in 1930 reenacted Sections 581 and 586 of the Tariff Act of 1922, without change, each of which sections contained the "four leagues of the coast" provision, is practically conclusive evidence that Congress did not regard or understand that these sections of the Act of 1922 were amended by the treaty.

> Having reached the conclusion that the treaty of 1924 did not repeal or abrogate the clause fixing a four-league zone in our customs revenue laws (including Section 581), the next question is, whether the *Mazel Tov* may be charged with the payment of the penalty of $14,286.18 assessed against the master for having on board merchandise not included or described in the vessel's manifest.

The opinion does not discuss the decision of this Court in *Ford* v. *United States, supra,* 273 U. S. 593, in which this Court said (at pp. 618–619):

> Considering the friendly purpose of both countries in making this treaty, we do not think any narrow construction should be given which would defeat it. The parties were dealing with a situation well understood by both. In effect they wished to enable the United States better to police its seaboard by enabling it, within an hour's sail from its coast beyond its territorial jurisdiction and on the high seas, to seize British actual or would-be smugglers of liquor and, if they were caught, to proceed criminally against them as if seized within the three-mile limit for the same offenses, in reference to liquor importation. No particular laws by title or date were referred to in the treaty but only the purpose and effect of them. Plainly, it was the purpose of the contracting parties that vessels and men who are caught under the treaty and are proven

Hennings v. *United States*, 13 F. (2d) 74 (C. C. A. 5th); *United States* v. *Ferris*, 19 F. (2d) 925 (N. D. Cal.); *United States* v. *Schouweiler*, 19 F. (2d) 387 (S. D. Cal.); *United States* v. *Cargo ex British Schooner Patara*, 40 F. (2d) 74 (E. D. N. Y.). After the passage of the Tariff Act of 1930 in which Section 581 of the Tariff Act of 1922 was reenacted verbatim, the Department continued to follow this construction of the Treaty.[8] The view of the Treaty taken by the Department of Justice is in accord with that of the District Court in this case. If that view is correct and if the question of the legality of the seizure is material and was properly raised in the District Court, the judgment of the court below should be reversed.

C

Lawyers for the Government other than those employed in the Department of Justice take a different view of the Treaty in its relation to the Tariff Acts of 1922 and 1930. In their view the result reached by the court below was correct.

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[8] When a treaty and a Federal statute conflict an attempt to give effect to both will be made. *Bartram* v. *Robertson*, 122 U. S. 116. If there is a clear conflict the latest in point of time controls. *Whitney* v. *Robertson*, 124 U. S. 190. But this Court will not disregard a treaty's terms, because of subsequent legislation, unless compelled to do so by language so pointed as to leave no doubt that such was the objective of Congress. *Chew Heong* v. *United States*, 112 U. S. 536. See 30 Columbia Law Rev. 521 (1930).

The contention is that the Treaty of 1924 was not a limitation upon the right to search and seize British vessels within the twelve-mile limit, but was an extension of the right always conceded by Great Britain to seize and search vessels within the three-mile limit so as to permit seizures beyond the territorial waters of the United States, provided the vessel was within one hour's sailing distance of the coast; that there was no intention on the part of the United States or Great Britain to surrender claims of sovereign right, except that Great Britain waived its right to protest seizures beyond the three-mile limit in a very limited number of cases defined in the Treaty, in return for which her ships were permitted to transport intoxicating liquors within the territorial waters of the United States as part of their stores.

Under this construction of the Treaty, if the search and seizure takes place beyond treaty limits, but within the twelve-mile limit provided in our customs laws, the Treaty would have no application and the rights of the United States and of the offending ship would be unaffected by it. Conclusion would then follow that the search and seizure in this case was lawfully made pursuant to the provisions of the Tariff Acts, and decision would be controlled by cases decided in this Court which recognize the right of a nation to exercise authority beyond the three-mile limit. *Church* v. *Hubbart,* 2 Cranch, 187; *Hudson* v. *Guestier,* 6 Cranch,

281; *The Richmond* v. *United States*, 9 Cranch, 102, Cf. *The Apollon*, 9 Wheat. 361; *Manchester* v. *Massachusetts*, 139 U. S. 240, 258; *United States* v. *Bowman*, 260 U. S. 94. According to this theory the Treaty is a mere renunciation by Great Britain of all right to question the validity of seizures within treaty limits, but was not intended to affect the asserted right of the United States to search and seize foreign vessels within four leagues of its coast.

The fact that the Treaty was carefully limited to ships engaged in liquor violations lends force to this view. The diplomatic correspondence discloses that both nations were quite insistent in declining to qualify or surrender their conflicting contentions. Great Britain insisted that there could be no right of search and seizure beyond three miles from the coast. The United States insisted that such rights could lawfully be exercised within twelve miles of its coast. Obviously the Treaty was not intended, on either side, to compromise these conflicting views. The Tariff Acts remained in force and continued to be an assertion of the power which Great Britain was disputing. Thus it is said that the contracting governments wished to find a *modus operandi* rather than a definitive solution of their differences of opinion upon a disputed question of international law, and that their purpose was to remove from the realm of conflict the cases in which Great Britain was willing to forbear protest, all other cases being left open to discussion

and adjustment between the two countries when they should arise.

This, it is argued, the Treaty accomplished by His Britannic Majesty's agreement to raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters in the limited class of cases defined in the Treaty. Such provision, it is said, characterizes the Treaty, not as a limitation or definition of rights, but as an agreement to forbear the assertion of rights in particular cases. There are reasons of policy which favor this interpretation. The making of such conventions between nations is to be commended. It is as if neighbors, in a friendly spirit, were to agree that while disputable questions involving a general principle might arise and be the subject of future discussion and adjustment between them, certain cases should be removed from the realm of their dispute so as to avoid the probability of immediate and serious controversy without the surrender of principle upon either side. Such conventions between nations are desirable in the interests of peace and should be encouraged. If interpreted as a surrender of rights contended for by either party in cases which are not expressly covered by the terms of the agreement, the making of such conventions will be fraught with danger to both, and resort to this sensible method of preserving friendly relations will be discouraged.

With these considerations in mind, it is argued that the right of the United States to board a for-

eign vessel and to inquire as to violations of the customs laws has existed almost from the beginnings of the Government; that the legislation in the Tariff Acts of 1922 and 1930 is an assertion of control over waters adjacent to our shores exercised from the beginning; that it is therefore not lightly to be assumed that this Government, in 1924, intended to abandon this policy; that the Treaty in terms expresses no such intention, and is so drawn as merely to express the agreement of His Britannic Majesty to raise no objection to this policy when applied in particular cases, and that by its reenactment of the provisions of the Tariff Act of 1922 in the Tariff Act of 1930 Congress showed that it did not regard the Treaty as a limitation upon this policy.

The interpretation of the Treaty as a limitation upon the asserted right of visitation, search, and seizure of vessels results in an immunity of vessels carrying liquor which was quite contrary to the purpose of the Treaty to make more effective the enforcement of the laws of the United States prohibiting the importation of intoxicating liquors. With respect to all other vessels the asserted right of the United States to visit, search, and seize within the twelve-mile limit was unaffected by the Treaty. The limitation upon the right with respect to vessels engaged in the liquor traffic, if any was intended by the Treaty, was dependent upon the speed of the vessel, a fact which can not be ascertained in advance of visitation and search

unless she be under way and at full speed when observed by the revenue officers. Nor can it be ascertained, prior to boarding the vessel, whether she is engaged in carrying liquor, and is therefore subject to visitation and search only if capable of a certain speed, although if not engaged in such traffic she would be subject to visitation, search, and seizure for violation of the customs laws, regardless of her speed. Such results are quite unreasonable and should not be presumed to have been intended. Obviously, the only practical way to have dealt with this problem was for the United States to continue to exercise the right of visitation and search in all cases covered by the statute, Great Britain retaining the right to object in all cases where after visitation and search the facts should disclose that the case was not within the Treaty, either because the vessel was not violating any liquor law or, if she was, was not seized within treaty limits.

The consideration moving to Great Britain was the right to transport liquors within the territorial waters of the United States, as provided in Article III. The only consideration moving to the United States was the agreement of Great Britain not to object to the visitation, search, and seizure of British vessels within the treaty limits. If, in agreeing not to object, Great Britain imposed a limitation upon the right of visitation, search, and seizure asserted by the United States with respect to all vessels within twelve miles of its shore, the arrange-

ment was quite unworkable and did not serve the purpose sought to be accomplished.

The rights asserted by the United States find ample support in international law and in the practices of maritime nations, including the practices of Great Britain, until 1876. (See pp. 47–52, *infra.*) If in agreeing not to protest against the exercise of rights recognized under the law of nations Great Britain imposed a limitation upon their exercise, and at the same time procured for British ships the right to transport intoxicating liquors within the United States, the treaty appears one-sided. It is therefore more reasonable to construe the provisions of Article II not as a limitation upon the asserted rights of the United States, but merely as an agreement on the part of Great Britain not to object to the assertion of such rights in certain cases. This results in a fair and workable arrangement.

Several decisions are referred to as supporting this view. In *The Vinces,* 20 F. (2d) 164 (E. D., S. C.), affirmed 27 F. (2d) 296, (C. C. A. 4th) *sub nom. Gillam* v. *United States,* certiorari denied 270 U. S. 635, a British vessel which came within one hour's sailing distance of the coast was pursued by a Coast Guard cutter and seized beyond the twelve-mile limit and more than an hour's sailing distance from the coast. Forfeiture was sought on several grounds, including violation of various provisions of the Tariff Act of 1922. It was contended that the seizure was illegal because made outside of the

treaty limits. While the court upheld the forfeiture on several grounds, it disposed of the argument based on the treaty as follows (p. 174):

> * * * If the contention of counsel is correct, then the effect of the treaty in a large number of cases would be to restrict the rights of the United States; but that was not the object of the treaty. As was said by the Supreme Court in the case of *Ford* v. *U. S.*, 47 S. Ct. 531, 71 L. Ed. —, decided April 11, 1927, the parties were dealing with a situation well understood by both, and wished to enable the United States better to police its seaboard by enabling it within an hour's sail from its coast beyond its territorial jurisdiction and on the high seas to seize British actual or would-be smugglers of liquor.
>
> The court also said that the treaty indicates a considerate purpose on the part of Great Britain to discourage her merchant ships from taking part in the illicit importation of liquor into the United States, and the further purpose of securing without objection or seizure the transportation on her vessels through the waters and in the ports of the United States of sealed sea stores and sealed cargoes of liquor for delivery at other destinations beyond the United States, and that the counter consideration moving to the United States is the *enlargement* (italics mine) and the definite fixing of the zone of legitimate seizure of British hovering vessels seeking to defeat the laws against importation of liquor into this country from the sea.

> The court also said that, considering the friendly purposes of both countries in making the treaty, it should not be given a narrow construction which would defeat it. *Ford* v. *U. S.*, supra.
>
> There is not a syllable in the treaty itself which indicates any intention to restrict or abrogate any of the existing rights of the United States in reference to the subject matter. At the time the treaty was executed, and for a long time anterior thereto, the United States had exercised the right of search and seizure within the 12-mile limit. Similar rights, as we have seen, had been exercised by the British government from the early part of the eighteenth century. It is inconceivable that the parties could have intended to abrogate any such rights already existing without an explicit statement to that effect. I am clearly of opinion that the British treaty is not exclusive and did not abrogate the statute of the United States providing for search and seizure within the 12-mile limit.

In affirming the decree, the Circuit Court of Appeals said (p. 300):

> * * * And we do not think that the right within the 12-mile limit to seize and proceed against vessels bound for the United States, for violation of the provisions of its revenue laws, has been limited in any way by the provisions of the Treaty with Great Britain of 1924 (43 Stat. 1761). The purpose of that treaty, so far as the question

here is concerned, was to secure the right to search and arrest ships from which intoxicating liquors are sold just beyond the limits of territorial jurisdiction, not to interfere with the preexisting right to board and arrest ships bound for the United States which have failed to comply with the provisions of its tariff laws. From the correspondence attending the negotiation of the treaty, this clearly appears.

In *The Metmuzel,* 49 F. (2d) 368 (C. C. A. 4th), certiorari denied, 283 U. S. 866, the court sustained a decree of forfeiture of a French [9] vessel sighted within six miles of the coast of the United States and seized within twelve miles of the coast. It does not appear whether the vessel was sighted or seized within one hour's sailing distance. The court upheld the seizure in part upon authority of its decision in *Gillam* v. *United States, supra.* It does not appear whether any objection to forfeiture because of treaty provisions was made. Other cases cited in support of this view are *The Panama,* 6 F. (2d) 326 (S. D. Tex.); *The Resolution,* 30 F. (2d) 534 (E. D. La.); *The Pescawha,* 45 F. (2d) 221 (D. Ore.). See also *Ford* v. *United States,* 10 F. (2d) 339 (C. C. A. 10th), affirmed 273 U. S. 593, *supra.*

There are other cases where seizures of foreign vessels were made, or the vessels were sighted, within the twelve-mile limit, and possibly beyond treaty

[9] A treaty with France, similar to the treaty with Great Britain, was proclaimed on March 12, 1927 (45 Stat. 2403).

limits, in which forfeiture was decreed, although it does not appear that the question of seizure in violation of treaties was raised, and the opinions do not discuss the effect of the treaties. *United States* v. *63 Kegs of Malt,* 27 F. (2d) 741 (C. C. A. 2d); *The Newton Bay,* 30 F. (2d) 444 (E. D. N. Y.), affirmed 36 F. (2d) 729 (C. C. A. 2d); *The Amaranth,* 35 F. (2d) 872 (S. D. N. Y.); *The Marion Phillis,* 36 F. (2d) 688 (C. C. A. 2d); *The Deauville,* 49 F. (2d) 372 (S. D. Ala.); *The Throndyke,* 53 F. (2d) 239 (N. J.); *The Miss C. B.,* 59 F. (2d) 744 (S. D. Ala.).

In support of the view presently under discussion it is urged that its acceptance is necessary to the normal development of international law. With respect to waters within the three-mile zone, known internationally as "territorial waters," it is said that the law is static, and that there is little or no room for further development. The provisions of Article I of the Treaty, which refer to the three-mile zone, are therefore merely declaratory of settled international law. Outside that zone, however, the law is in process of evolution. Its growth results from the assertion by one or more sovereigns of rights to which other sovereigns do not assent. When that which is affirmed on the one hand and denied on the other comes within the cognizance of a competent court the decision one way or the other is either tacitly accepted or explicitly rejected by the sovereign aggrieved by the decree.

As a judicial question, however, the issue is settled by the decision as far as concerns the sovereign whose court has made the decree. If the other sovereign formally protests the decision the question becomes the subject of diplomatic consideration. Upon the outcome of such consideration depends the question whether or not the judicial decision takes a permanent place in the process of evolving international law.

In July of this year the Privy Council in England (*Croft* v. *Dunphy,* 48 The Times L. R. 653) considered the validity of a statute enacted by the Canadian Parliament which provided that if any vessel was hovering in territorial waters of Canada she might be boarded and her cargo examined, and if any dutiable goods or any goods the importation of which into Canada was prohibited were found on board, the vessel and her cargo were to be seized and forfeited. For the purposes of the section "territorial waters" of Canada were to mean the waters forming a part of Canada and waters adjacent thereto, within three marine miles thereof in the case of any vessel, and within twelve marine miles thereof in the case of any vessel registered in Canada.

The Supreme Court of Canada held that the statute in question was valid. Lord Macmillan, in delivering the judgment of the Privy Council, said that it might be accepted as a general principle that states could legislate effectively only for

their own territory; and to what distance seaward the territory of a state was to be taken as extending was a question of international law, upon which their Lordships did not deem it necessary or proper to pronounce.

In the course of his judgment, Lord Macmillan said (p. 653):

> * * * But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. There is the weighty authority to this effect of Lord Stowell, who, when Sir William Scott, said in the case of *Le Louis* (2 Dodson, 210, at p. 245): "Maritime States have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws, which within certain limited distances more or less moderately assigned, subject foreign vessels to such examination."

In further support of this statement Lord Macmillan cites such authorities as Sir Travers Twiss' treatise on International Law; Halleck's "International Law"; Hall's "Foreign Powers and Jurisdiction of the British Crown"; and "Without further multiplying quotations" adds references to Phillimore's "International Law" and Wheaton's "International Law", 6th Edition (See footnote 10, *infra,* p. 50). Lord Macmillan further said (p. 654):

> * * * It may be that legislation of the Dominion Parliament may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the British North America Act, 1867, has not conferred power on the Dominion Parliament to legislate contrary to these principles. In the present case, however, there is no question of international law involved, for legislation of the kind here challenged is recognized as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. * * *
>
> * * * * *
>
> * * * Now from early times the customs legislation of the Imperial Parliament has contained antismuggling provisions authorizing the seizure of vessels having dutiable goods on board when found "hovering" off the coast within distances substantially

> in excess of the ordinary territorial limits. So far back as 1736 there is to be found in the statute 9 Geo. II., c. 35, s. 22, legislation authorizing the forfeiture of dutiable goods found in vessels "hovering" within two marine leagues of the shore. There are numerous subsequent enactments of a similar character, and legislation of this nature has been extended as far as to twenty-four miles from the coast. So familiar indeed are such provisions in the history of British customs legislation that the series of measures embodying them have come to be known compendiously as the "Hovering Acts." * * *

While this judgment did not involve the determination of any question of international law, because the Canadian legislation in question could have no application to foreign ships beyond the three-mile territorial limit, the judgment of the Privy Council declares that it has long been recognized that a state may enact laws operating to a distance exceeding the ordinary limits of its territory; and in support of this declaration refers to the Customs legislation of the Imperial Parliament which from early times had contained antismuggling provisions authorizing the seizure of vessels found hovering off the coast within distances substantially in excess of territorial limits.[10]

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[10] Some of the early British statutes relating to smuggling are Act 5, George I, ch. 11, p. 127 (1718); Act 9, George II, ch. 35, p. 21 (1736); Act 3, George III, ch. 22, p. 443 (1762); Act 24, George III, ch. 47, p. 660 (1784). These

Great Britain's comparatively recent change of policy does not impair the recognized right of other nations to enact such legislation. The existence of such legislation in the Tariff Act of 1922, and its reenactment in the Tariff Act of 1930, when read in connection with the judgment of the Privy Council, and the fact that in the instant case His Brittanic Majesty has raised no objection to the boarding, search, and seizure of the *Mazel Tov,* lends force to the view that the Treaty of 1924 was not intended to be, and is not now understood to be, a limitation upon the right of the United States to make search and seizure pursuant to well recog-

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Acts were repealed by Act 6, George IV, ch. 105, p. 614 (1825). Act 6, George IV, ch. 107, sec. 7, p. 697, provided for production of manifests by vessels within 4 leagues of the coast, and Act 6, George IV, ch. 108, sec. 3, p. 742, provided for forfeiture of foreign vessels carrying certain goods within 8 leagues of the coast (or within 4 leagues of a limited part of the coast). Further provision against smuggling was made by Acts 3 and 4, William IV, ch. 53, p. 362 (1833). These statutes were repealed and the entire subject was dealt with in the Customs Consolidation Act of 1876, 39 and 40 Vict., ch. 36, limiting the right of search and seizure to one league from the coast. The British statutes mentioned, and others exercising authority over the Ceylon pearl banks beyond ordinary territorial waters are discussed in Jessup; *Law of Territorial Waters and Maritime Jurisdiction*, pp. 14–17, 77–79. A large number of countries have had hovering statutes at various times which applied to foreign vessels outside of territorial waters. Many of these statutes are collected in Crocker, *The Extent of the Marginal Sea.* See also 23 C. L. R. 472–476 (1923). The subject is dealt with by several text writers and the right to exercise authority beyond territorial waters under certain circumstances is upheld. See Hyde: *International*

nized principles of international law anywhere within four leagues of her shores.

In the view of the Treaty here under discussion the whole question reduces itself to this:

Within the three-mile limit there is no longer room for dispute respecting what may or may not lawfully be done. Outside the three-mile limit, but within the Treaty limits, there is room for such dispute, but Great Britain agrees that she will not raise the question in cases involving violation of our liquor laws. Beyond the Treaty limits, and up to the limit specified in municipal legislation, there is the same room for discussion, for assertion and protest, and both parties are as free to assert their respective contentions as before the Treaty was made.

If the reasoning advanced by the court below in support of its judgment is sound, or if the Treaty with Great Britain is not to be construed as imposing any limitation upon the asserted right of the United States to search and seize vessels within the

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Law Chiefly as Interpreted and Applied by the United States, vol. 1, p. 420; Oppenheim: *International Law* (4th Ed.), vol. 1, p. 400; Hall: *Foreign Jurisdiction of the British Crown*, pp. 244–245; Westlake: *International Law* (2d Ed.), Part 1, p. 176; Twiss: *The Law of Nations: Rights and Duties in Time of Peace* (2d Ed.), Sec. 190, p. 311; Dana's *Wheaton on International Law* (8th Ed.), p. 259; Halleck: *International Law* (3rd Ed.), vol. 1, p. 157; Phillimore: *International Law*, par. 198. See also argument of Sir Charles Russell before the Bering Sea Arbitral Tribunal in 1893, *Fur Seal Arbitration*, Vol. XIII, Sec. 1076, p. 298.

twelve-mile limit, and is merely an agreement on the part of Great Britain to raise no objection to any such search and seizure if the vessel be within one hour's sailing distance of the coast, then the judgment of the court below should be affirmed. If, however, the Treaty is to be construed as limiting the right of search and seizure, in all cases, to vessels within such sailing distance, then the judgment of the court below should be reversed unless the question was immaterial or was waived, as we have argued in Point I, in which case the judgment should also be affirmed.

CONCLUSION

For the reasons stated in Point I the judgment of the court below should be affirmed.

If the reasoning of Point I be rejected, we present the conflicting views regarding the application and interpretation of the Treaty, set forth in Point II, for the consideration of the Court in determining the validity of the seizure.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

WHITNEY NORTH SEYMOUR,

A. W. HENDERSON,
Special Assistants to the Attorney General.

W. MARVIN SMITH,
Attorney.

DECEMBER, 1931.

APPENDIX A

The pertinent provisions of the Tariff Act of 1922, c. 356, 42 Stat. 858, 979, 980, 982, and the identical provisions of the Tariff Act of 1930, c. 497, 46 Stat. 590, 747, 748, 751 (U. S. C. Sup., Title 19, Secs. 1581, 1584, 1594), are as follows:

SEC. 581. BOARDING VESSELS

Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation.

Officers of the Department of Commerce and other persons authorized by such depart-

ment may go on board of any vessel at any place in the United States or within four leagues of the coast of the United States and hail, stop, and board such vessels in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

* * * * *

SEC. 584. FALSITY OR LACK OF MANIFEST—PENALTIES

Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of $500, and if any merchandise, including sea stores, is found on board of or after having been unladen from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge or the owner of such vessel or vehicle shall be subject to a penalty of $500: *Provided*, That if the collector shall be satisfied that the manifest was lost or mislaid without intentional fraud, or was defaced by accident, or is incorrect by reason of clerical error or other mistake and that

no part of the merchandise not found on board was unshipped or discharged except as specified in the report of the master, said penalties shall not be incurred.

If any of such merchandise so found consists of smoking opium or opium prepared for smoking, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty of $25 for each ounce thereof so found. Such penalty shall, notwithstanding the proviso in section 594 of this Act (relating to the immunity of vessels or vehicles used as common carriers), constitute a lien upon such vessel which may be enforced by a libel in rem; except that the master or owner of a vessel used by any person as a common carrier in the transaction of business as such common carrier shall not be liable to such penalty and the vessel shall not be held subject to the lien, if it appears to the satisfaction of the court that neither the master nor any of the officers (including licensed and unlicensed officers and petty officers) nor the owner of the vessel knew, and could not, by the exercise of the highest degree of care and diligence, have known, that such smoking opium or opium prepared for smoking was on board. Clearance of any such vessel may be withheld until such penalty is paid or until a bond, satisfactory to the collector, is given for the payment thereof. The provisions of this paragraph shall not prevent the forfeiture of any such vessel or vehicle under any other provision of law.

SEC. 585. DEPARTURE BEFORE REPORT OR ENTRY

If any vessel or vehicle from a foreign port or place arrives within the limits of any collection district and departs or at-

tempts to depart, except from stress of weather or other necessity, without making a report or entry under the provisions of this Act, or if any merchandise is unladen therefrom before such report or entry, the master of such vessel shall be liable to a penalty of $5,000, and the person in charge of such vehicle shall be liable to a penalty of $500, and any such vessel or vehicle shall be subject to forfeiture, and any customs or Coast Guard officer may cause such vessel or vehicle to be arrested and brought back to the most convenient port of the United States.

SEC. 594. LIBEL OF VESSELS AND VEHICLES

Whenever a vessel or vehicle, or the owner or master, conductor, driver, or other person in charge thereof, has become subject to a penalty for violation of the customs-revenue laws of the United States, such vessel or vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same: *Provided,* That no vessel or vehicle used by any person as a common carrier in the transaction of business as such common carrier shall be so held or subject to seizure or forfeiture under the customs laws, unless it shall appear that the owner or master of such vessel or the conductor, driver, or other person in charge of such vehicle was at the time of the alleged illegal act a consenting party or privy thereto.

APPENDIX B

Pertinent provisions of the Treaty with Great Britain proclaimed May 22, 1924 (43 Stat. 1761):

Article I

The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters.

Article II

(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is commit-

ting or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

Article III

No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories or possessions on board British vessels voyaging to or from ports of the United States, or its territories or possessions or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall

be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.

Article IV

Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II of this Treaty or on the ground that it has not been given the benefit of Article III shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910, but the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided.

Article V

This Treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

Three months before the expiration of the said period of one year, either of the High Contracting Parties may give notice of its

desire to propose modifications in the terms of the Treaty.

If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the Treaty shall lapse.

If no notice is given on either side of the desire to propose modifications, the Treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the Treaty, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the Treaty shall lapse.

Article VI

In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present Treaty the said Treaty shall automatically lapse, and, on such lapse or whenever this Treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this Treaty not been concluded.

The present Convention shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Brittanic Majesty; and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof, etc.

(The treaty is signed on behalf of the United States by Charles Evans Hughes and on behalf of Great Britain by A. C. Geddes.)

148630—32——5

APPENDIX C

THE SECRETARY OF STATE TO THE BRITISH AMBASSADOR

DEPARTMENT OF STATE,
Washington, June 26, 1922.

EXCELLENCY: I have the honor to lay before you certain important considerations with respect to a possible cooperation on the part of British and American authorities with regard to the smuggling of liquor. The authorities of the United States charged with the duty of enforcing the law of this country with respect to this matter are confronted by serious difficulties which they feel might be effectively met with the assistance of British authorities in British territories, which it appears are made bases of operations in flagrant violation of constitutional and statutory provisions of the United States. It is understood that the importation of intoxicating liquors into the Canadian Provinces of Nova Scotia, Manitoba, Saskatchewan, and Alberta, is also prohibited by law.

I venture to submit definite suggestions as to methods by which the existing extremely unfortunate conditions might be remedied. It is believed that effective measures for this purpose might be taken by a careful supervision of the issuance of registries to vessels suspected of being engaged in illegal traffic and of the issuance of clearance papers for such vessels, and by an international ar-

rangement between the United States and Great Britain under which the authorities of each nation would be authorized to exercise beyond the three-mile limit of territorial waters a measure of control over vessels belonging to the other.

It has been found that many of the ships engaged in the illegal smuggling of liquor into the United States are registered under the British flag and that large quantities of liquor are carried by such vessels from the Bahama Islands and from Bermuda. It appears that, in order to evade the customs officers and prohibition agents of the United States, the persons engaged in this illicit traffic of smuggling liquor into the United States from the Bahama Islands have adopted the practice of packing the liquor so that it can be easily taken ashore in the United States. Liquor is placed in triangular-shaped packages consisting of six bottles carefully sewed in burlap, so that it can very easily be unloaded, and even a small ship can carry a very large consignment in a comparatively small hold space. Liquor is carried on both large and small ships; schooners carry cargoes out to sea from Nassau and unload them off the coast of the United States, and smaller boats carry their cargoes to Bimini and Gun Key, and from these places it is transported to West Palm Beach, Daytona, and Fort Lauderdale. A list of vessels said to be plying between the United States and the Bahamas is herewith enclosed.

This Department's attention has been drawn to the ease with which it seems vessels of American registry are transferred to British registry for the purpose of preventing the authorities of the United

States from taking the necessary steps to thwart these smuggling operations. It is understood that British laws require that vessels to be entitled to British registry must be owned by British subjects. Apparently reliable information indicates that American citizens of questionable reputation who are known to be engaged in the smuggling business have succeeded in obtaining British registry at the Bahama Islands for a large number of American vessels by means of the execution of paper transfers purporting to convey title to vessels to British subjects in the Bahamas, although the actual interest in the vessels continues to vest in American citizens.

Reference may be made in this connection to the fact that, under the laws of the United States relating to the transfer of registry, it is necessary for the owner of an American vessel to obtain a certificate from the United States Shipping Board showing that the vessel has first been tendered to the Board before the privilege of transferring it to a foreign register can be obtained. It would be of great assistance to this Government in combating the illicit traffic in liquors if authorities at Bermuda and in the Bahama Islands should refuse the privilege of registry to American vessels unless a certificate from the United States Shipping Board is produced showing that the vessel has first been tendered to it. It is understood that for some time British laws have imposed restrictions necessitating some form of acquiescence of British authorities to the transfer of registry. It would seem that laws of this character can not well be effectively administered unless the authorities of one

nation are disposed to take cognizance of the legislation of another nation.

There is information before the Department indicating that the authorities at the Bahama Islands have in many cases issued two sets of clearance papers to ships which have taken on board cargoes of liquor. It is said that persons engaged in this traffic have openly made the statement that they have no trouble in obtaining from the Bahamas's customs officials one set of clearance papers for a cargo of liquor declared to be destined for Halifax, Tampico or St. Pierre, and other clearance papers issued "in ballast" for an American port. This procedure is adopted by the liquor smugglers so that the ship may come within unloading distance of American shores, and if caught with a cargo of liquor on board the master can exhibit the clearance to Mexico or Canada; if the ship has succeeded in unloading the cargo on the shore without being captured, it proceeds into an American port with the second clearance papers.

In this connection I beg to quote for your information three paragraphs from an affidavit executed by a federal prohibition agent of this Government with respect to the proposal declared to have been made to him by Mr. M. Cole, who signs clearance papers for the Comptroller of Customs for the British Government at Nassau, Bahamas, concerning the issuance of two sets of clearance papers for liquor ships:

> That deponent asked Mr. Cole how the liquor runners arranged their clearance papers and if it was possible to get an extra set of clearance papers. Mr. Cole said "Just a minute" and then went to the other side of

the room and motioned deponent to come over which deponent did, Mr. Cole then stated substantially as follows:

That "there are a number of ways to handle it but the best and simplest way we find is, First to give you clearance papers with your liquor, then in an hour or so come back and state that you had discharged your cargo of liquor on the high seas and then we will give you another set of papers for 'in ballast' for any American port." Mr. Cole explained that the first set of papers referred to would be for a Foreign Port and that if you were searched they could not touch you and that after you had discharged your cargo of liquor you could enter the American Port with your papers showing "in ballast."

Deponent states further that Mr. Cole did not say that there would be any money required outside the regular fees but intimated that he and the boys expected to be taken care of.

While existing nefarious practices might be largely stopped by appropriate precautionary measures with respect to the issuance of British registries to vessels engaged in smuggling and with respect to the issuance of clearance papers to such vessels, the situation with which the authorities of this Government are confronted has become so serious that this Government feels prompted to inquire whether your Government would be disposed to enter into a treaty for the purpose of checking the illegal practices in question. Such a treaty might contain reciprocal provisions authorizing the authorities of each Government to exercise a right of search of vessels of the other beyond the three-mile limit of territorial waters *to the extent of*

twelve miles from the shore. It would appear that no inconvenience would be experienced as a result of the exercise of such a right by vessels engaged in legitimate trade between Nassau and Halifax. It is evidently natural for such vessels to take a direct route to Hatteras and then a direct course to Diamond Shoal Lighthouse and from thence to Halifax. Apparently this course brings vessels at no point within four leagues of the American shore. I shall be glad if you will bring the contents of this communication to the attention of your Government, which I have no doubt will appreciate the serious considerations which prompt the request that the matters therein presented receive earnest consideration at the earliest convenient time.

Accept (etc.).

CHARLES E. HUGHES.

APPENDIX D

THE BRITISH AMBASSADOR TO THE SECRETARY OF STATE

No. 781

BRITISH EMBASSY,
October 13, 1922.

SIR: Mr. Chilton duly forwarded to His Majesty's Government copy of your note of June 26th last in which certain suggestions were made for cooperation between the British and United States authorities with the object of restricting the smuggling of alcoholic liquor into the United States.

I am now directed to inform you that His Majesty's Government have naturally been desirous of preventing, by every means within their power, any breaches of the law in the Bahamas or elsewhere in the British West Indies by persons engaged in illicit trade with the United States, and the proposals made by the United States Government with this object have received the most sympathetic consideration. With the object of preventing the development of illegal practices in connection with this traffic instructions had, in fact, some months before the receipt of the representations made by the United States Government, been sent to the Governor of the Bahamas, who was at that time requested to see that no irregularities of any kind should be permitted in connection with vessels clearing from that colony and that the formalities required in connection with such clearances should be most

strictly enforced. Instructions have also been given to the local Registrars of Shipping which will, it is anticipated, have the effect of preventing any future transfers of United States vessels to the British flag until a complete investigation of the circumstances can be made. Investigations, which it is hoped will shortly be concluded, are being made into the position and proceedings of the vessels, a list of which was enclosed in your note of June 26th.

In dealing with the precautions to be taken to control transfers from the United States to the British flag, the suggestion that, in such cases, the local Registrar of Shipping should require the production of a certificate from the United States Shipping Board has been carefully examined. It has been found that there would be great difficulties in the adoption on British territory of such a requirement, and it would be still more difficult to give such a requirement the force of law. With a view, however, to meeting the wishes of the United States Government on this point as far as is practicable, instructions have been given to the Registrar of Shipping at Nassau to the effect that, in transfer cases in which any possible doubt exists as to the *bona fides* of the parties to the transaction, the nonproduction of the Shipping Board certificate should be taken as a ground of suspicion, involving reference of the case to the Board of Trade in London for further directions. The delay necessitated by this procedure would, it is hoped, be in itself sufficient to reduce to a minimum the danger of transfers being successfully effected in improper cases. It may be added that if, in spite of

the precautions taken, a fictitious owner secures registry and there is reason to believe that his title is open to question, an enquiry may be instituted under Section 51 of the Merchant Shipping Act, 1906, and if, as a result of these proceedings, it becomes clear that the transaction was fraudulent, the ship is subject to forfeiture. Proceedings under this section of the act had in fact already been instituted in some cases, and the possibility of instituting similar proceedings in the case of some of the vessels referred to in the note from the State Department is being examined.

His Majesty's Government had thus taken steps even before the receipt of representations from the United States Government to prevent the practices to which attention has now been drawn. They have now, as already indicated, issued supplementary instructions in the matter, and hope that the measures taken will prove successful in preventing any breaches of the local law. They feel, however, more difficulty in accepting the proposal that a treaty should be made authorising the authorities of each government to exercise a right of search of vessels of the other beyond the three-mile limit of territorial waters up to a distance of twelve miles from the shore. His Majesty's Government have consistently opposed any extension of the limit of territorial waters such as that now suggested. They feel that the outbreak of smuggling which has led to the proposal can not be regarded as a permanent condition, but as one which will no doubt be suppressed by the United States authorities within the not distant future. While, therefore, they are desirous of assisting the United States Govern-

ment to the best of their ability in the suppression of the traffic and in the prevention of the abuse of the British flag by those engaged in it, they do not feel that they can properly acquiesce, in order to meet a temporary emergency, in the abandonment of a principle to which they attach great importance.

In communicating the above to you I am directed to add that while His Majesty's Government are, as already indicated, unable to acquiesce in the proposed treaty for the extension of territorial waters, they are nevertheless most desirous of taking any steps within their power to prevent any infractions of the local law by persons engaged in liquor smuggling.

I have (etc.).

A. C. GEDDES.

APPENDIX E

THE BRITISH AMBASSADOR TO THE SECRETARY OF STATE

BRITISH EMBASSY,
Washington, December 30, 1922.

No. 973.

SIR: On September 27th last a statement, purporting to be officially inspired, appeared in the daily press to the general effect that the United States Government had decided to restrain prohibition enforcement officials from seizing, outside the three-mile limit of territorial waters, foreign vessels which are suspected of being engaged in the smuggling of liquor. According to the same statement, however, this ruling did not apply to the searching, beyond the three-mile limit, of ships which were known to be in contact with the shore, such as the running of small craft of the ship to some point on the land.

From semiofficial correspondence which has since passed between us in regard to individual British vessels arrested outside territorial waters on the charge of liquor smuggling it appears that the United States Government are in fact acting on the principle defined above. The majority of such vessels either have, through your kind intervention, already been released or else are in process of being restored to their owners. The only exceptions to this rule appear to have been made in the

case of vessels, notably the *Grace and Ruby,* in respect of which a charge has been lodged of having been in communication with the shore by means of the ship's small boats.

In order to avoid the possibility of any misunderstanding, I am desired by my Government to make it clear that His Majesty's Government are unable to acquiesce in what they understand to be the ruling of the United States Government, namely, that foreign vessels may be seized outside the three-mile limit if it can be shown that they have established contact with the shore for illegal purposes by means of their own small boats. My Government must reserve their right to lodge a protest in any individual case in which action may be taken by the United States Government under this ruling.

I have (etc.).

A. GEDDES.

APPENDIX F

The Secretary of State to the British Ambassador

Department of State,
Washington, January 18, 1923.

Excellency: I have the honor to acknowledge the receipt of your note No. 973 of December 30, 1922, stating that your Government desires you to make it clear that it is unable to acquiesce in what it understands to be the ruling of the United States Government, namely, that foreign vessels may be seized outside the three-mile limit if it can be shown that they have established contact with the shore for illegal purposes by means of their own small boats. You state that your Government must reserve the right to lodge a protest in any individual case in which action may be taken by the United States Government in cases of this character.

I have the honor to state that consideration has been given to the statements contained in your note and the conclusion has been reached that the Government of the United States should adhere to the position it has previously taken that foreign vessels outside the three-mile limit may be seized when it is established that they are using their small boats in illegal operations within the three-mile limit of the United States. This conclusion is supported by the position taken by the British Government

in the case of the British Columbian schooner *Araunah,* which was seized off Copper Island, by the Russian authorities in 1888, because it appeared that members of the crew of the schooner were illegally taking seals in Bering Sea by means of canoes operated between the schooner and the land, and it was affirmed that two of the canoes were within half a mile of the shore. Lord Salisbury stated that Her Majesty's Government were "of opinion that, even if the *Araunah* at the time of the seizure was herself outside the three-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed license warranted her seizure and confiscation according to the provisions of the municipal law regulating the use of those waters." (Volume 82, British and Foreign State Papers, page 1058.)

I may add that it is not understood on what grounds the decision of His Majesty's Government in this matter was reached, in view of the position taken by Lord Salisbury in the *Araunah* case and the statement in your note No. 781 of October 13, 1922, that his Majesty's Government "are desirous of assisting the United States Government to the best of their ability in the suppression of the traffic and in the prevention of the abuse of the British flag by those engaged in it."

As you are doubtless aware, the case of the *Grace and Ruby,* to which you refer, is now pending before the Supreme Court of the United States and I shall be glad to inform you of its decision as soon as it is rendered.

Accept (etc.).

CHARLES E. HUGHES.

APPENDIX G

The British Chargé d'Affaires ad Interim to the Secretary of State

British Embassy,
Washington, July 10, 1923.

No. 578.

Sir: I have the honour to inform you that my attention has been drawn to certain comments in the press regarding the recent decision of the United State Circuit Court of Appeal in connection with the condemnation and forfeiture of the alleged British schooner *Henry L. Marshall* for smuggling liquor into the United States in contravention of the prohibition laws. You will recollect that this vessel was seized by United States Revenue officials in July 1921 when off the coast of New Jersey and outside the limit of United States territorial waters.

The general trend of these comments is to the effect that the view of many American legal experts that the United States Government has the right to seize rum runners outside the three-mile limit is shared by the State Department, and it is hinted that the absence of a protest by His Majesty's Government against the condemnation of the *Henry L. Marshall* by the United States Circuit Court of Appeal not only makes the case a useful precedent for similar future action by the United States au-

thorities outside the three-mile limit against British vessels suspected of rum running, but also implies a change in the attitude of His Majesty's Government towards the principle of such seizures outside the three-mile limit.

In order to avoid the possibility of any misunderstanding on the part of the United States Government as to His Majesty's Government's attitude in this matter I have the honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to inform you that any attempt on the part of the United States authorities to seize a British ship outside the three-mile limit would be regarded by His Majesty's Government as creating a very serious situation. In regard to the *Henry L. Marshall case,* I have been instructed to explain that the absence of a protest by His Majesty's Government against the condemnation of this vessel in no way implies any alteration in the views of His Majesty's Government with regard to the principle at stake, inasmuch as that vessel, owing to the circumstances in which she secured her British registry, was not recognized by His Majesty's Government as entitled to British registry. Consequently, His Majesty's Government have not felt called upon to assert the principle at stake on her behalf, since, as far as His Majesty's Government are concerned, the *Henry L. Marshall* remains an American vessel.

I have (etc.).

H. G. CHILTON.

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APPENDIX H

DRAFT OF PROPOSED TREATY SUBMITTED TO GREAT BRITAIN, FRANCE, ITALY, JAPAN, AND SPAIN, JUNE 19, 1923.

ARTICLE I. The High Contracting Parties, without attempting to extend as between themselves the limits of their respective territorial waters adjacent to the high seas, agree that the authorities of either High Contracting Party may, within the distance of twelve geographical miles from its coasts, board the private vessels of the other and make inquiry of the masters thereof as to whether such vessels or the person or persons controlling them are engaged in any attempt, either with or without the cooperation of other vessels, or persons on board the same, to violate the laws of the High Contracting Party making the inquiry, and prohibiting or regulating the unlading near, or importation into its territories of any articles.

An officer of one High Contracting Party boarding a private vessel of the other may examine the manifest of the vessel and make inquiry of the master with respect to the cargo and destination thereof. If such officer has reason to believe from the statements of the master or from documents exhibited by him or otherwise, that the vessel or the person or persons controlling it, either with or without the cooperation of other vessels, or persons on board the same, is or are engaged in the willful

commission of acts which constitute a violation of the laws of the State of which such boarding officer is an official, with respect to the unlading or importation of any article or articles, he shall impart his belief to the master of the vessel and thereupon may with the aid of the master institute a search of the vessel and an examination of any articles on board.

The search shall be conducted with the courtesy and consideration which ought to be observed between friendly nations. If there is reasonable cause for belief that the vessel or the person or persons controlling it is or are willfully engaged, with or without the cooperation of other vessels or persons on board the same, in the commission of acts which constitute a violation of the laws of the State whose officer has conducted the search, forbidding or regulating the unlading near, or importation into its territories of any article or articles, the vessel, cargo and the person or persons controlling it or them may be seized and brought in for an adjudication, and subjected to the imposition of the penalties established by law by the Party whose laws and regulations are found to have been violated.

ARTICLE II. Any article or articles the importation of which into the territories of either High Contracting Party is or are for any purposes prohibited by its laws, but which is or are listed as sea stores, or as cargo destined for a port foreign to either High Contracting Party, on board a private vessel of either High Contracting Party destined for a port of the other High Contracting Party, may be brought within the territorial waters of

certainty the position of a limit usually out of sight of land, at any rate on the Atlantic coast.

Lord Curzon adds that the Hovering Acts in the United Kingdom were entirely superseded by the Customs Consolidation Act, 1876, by which British municipal legislation is made to conform with international law.

July 14, 1923.

APPENDIX J

THE SECRETARY OF STATE TO THE BRITISH CHARGÉ D'AFFAIRES AD INTERIM

BRITISH EMBASSY,
Washington, July 16, 1923.

SIR: I have the honor to acknowledge the receipt of your communication No. 578 of July 10, last, in relation to the recent decision of the United States Circuit Court of Appeals in the case of the schooner *Henry L. Marshall,* and to certain American press comments thereon. You advert to the general trend of these comments and to the inferences which are drawn from the views of many American legal experts.

I note your statement that under instructions from your Government you inform me that any attempt on the part of the United States authorities to seize a British ship outside the three-mile limit would be regarded by your Government as creating a very serious situation. With respect to the case of the *Henry L. Marshall,* you state that you have been instructed to explain that the absence of a protest by His Majesty's Government against the condemnation of the vessel in no way implies any alteration in the views of your Government with respect to the principle at stake inasmuch as the vessel was not recognized as entitled by your Government to British registry; and you add, that so far as your Government is concerned, the *Henry L. Mar-*

shall remains an American vessel. The Department is pleased to receive this formal statement as to the status of the vessel as it is recalled that your Embassy had made protests against the seizure of the vessel in your communications No. 623, of August 11, 1921, and No. 686, of September 9, 1921, and that the Department had also been in receipt of communications from your Embassy in respect to the progress of the cause and the detention of certain members of the crew as witnesses.

In view of the emphasis placed in your last communication upon the principle deemed to be involved, it would seem appropriate to direct your attention to the precise import of the adjudications in the United States District Court for the Southern District of New York and, on appeal, in the United States Circuit Court of Appeals for the Second Circuit, from whose decrees it is not understood that the claimant has as yet sought by writ of certiorari to obtain a review in the Supreme Court of the United States. For this purpose I may refer to the pertinent facts as these have been judicially established and set forth in the statement of the case by the United States Circuit Court of Appeals. The vessel sailing under British registry in 1921 obtained clearance from West End, Bahama Islands, when actually laden with a cargo of intoxicating liquors. She received two clearances of the same date and signed by the same Collector of Revenue, one of which stated that she had cleared for Halifax with the cargo of liquor, the other that she had cleared for Gloucester, Massachusetts, in ballast. The same Collector furnished two bills of health, likewise differing as to destination. It was abundantly proved that the real object and only

business of the *Henry L. Marshall* was to peddle liquor along the coast of the United States. "Particularly", states the official report of the decision, "did she pursue her vocation while lying some nine or ten miles off Atlantic City and there sent liquor on shore, pursuant to previous arrangement made in the United States, by motor boats", which, however, were not a part of the schooner's equipment, and, so far as appears, did not belong to her owner. When the *Marshall* was boarded more than three miles from the New Jersey coast it was found that she had no manifest and still had on board a quantity of liquor.

The United States Circuit Court of Appeals in affirming the decrees which were passed upon the libels for forfeiture, held that the act of unlading although beginning beyond the three-mile limit continued until the liquor was landed; that the *Marshall's* cargo of whiskey was never manifested; that it was not unladen between the rising and setting of the sun and that no special license had been obtained for unloading at night; and that there was an unloading without a permit—all in violation of provisions of the Revised Statutes of the United States. The United States Circuit Court of Appeals concluded: (*a*) that there was an attempt to introduce all of the *Marshall's* cargo into the commerce of the United States, and that there was an actual introduction of a part of that cargo into that commerce; (*b*) that such attempt at introduction was by means of fraudulent practices, i. e., evasion of the provisions of the National Prohibition Act; (*c*) that there were wilful acts (i. e., rum running) by means whereof the United States was

deprived of duties upon the merchandise (i. e., whiskey) affected by the said act.

The foregoing conclusions are deemed by this Government to be self explanatory. They relate to the conduct of a vessel which was far from exercising the normal right of passage on the high seas adjacent to American waters in the course of a voyage between two British ports. They show that the vessel and those controlling it started upon its sinister voyage with connivance and aid of British authority in British territory; that its direct and single effort was by fraudulent means to introduce the cargo, and all of it, within the territory of the United States; and that the vessel prior to and at the time of its actual seizure, even though more than three miles from the shore, was hovering off the coasts of the United States and was engaged in an attempt to violate the laws of the United States by the introduction of the liquor within its territory. It should be added that adequate judicial procedure, as already noted, was available and used, in order to determine these facts, and in these circumstances the competent judicial authority of the United States has sustained the seizure of the vessel.

In view of this decision, and of the tenor of your communication, my Government hopes that it may be advised that His Majesty's Government does not consider, even in the case of a vessel admittedly of valid British registry, that such a vessel pursuing the course of conduct followed by the schooner *Henry L. Marshall* is making proper use of the British flag and that His Majesty's Government would not be disposed to espouse the cause of a

British merchant vessel in an effort unlawfully to introduce intoxicating liquors into the territory of the United States in the manner adopted by the schooner *Henry L. Marshall,* or in such a case to oppose the enforcement of the laws of the United States by means of the procedure taken in the case of that vessel and judicially approved.

Accept (etc.).

CHARLES E. HUGHES.

APENDIX K

THE SECRETARY OF STATE TO THE BRITISH CHARGÉ D'AFFAIRES AD INTERIM

DEPARTMENT OF STATE,
Washington, July 19, 1923.

The Secretary of State presents his compliments to the Chargé d'Affaires ad interim of Great Britain and acknowledges the receipt of the memorandum, under date of the fourteenth instant, expressing the views of His Majesty's Principal Secretary of State for Foreign Affairs, with respect to the proposed treaty relating to visit and search of vessels within twelve miles of the coasts of the parties, respectively, for the purpose of preventing the illegal introduction of articles into their territories, and also relating to the carriage, within territorial waters, of certain sealed stores and cargo destined for foreign ports.

Preliminarily, it should be observed that a draft treaty was submitted informally, simply for the purpose of avoiding misunderstanding and of making a concrete suggestion which could form the basis of discussion. It should also be said that it was not the purpose of the Secretary of State to propose an extension of the limits of territorial waters, and the draft proposal specifically negatived such an intention.

It is noted that Lord Curzon points out that the theory of the international validity of the three-

mile limit would be strengthened by the conclusion of a treaty making an exception for a special purpose, but that he is of the opinion that such a treaty would weaken the principle because it would form a precedent, the following of which would ultimately deprive the principle of force. It is not perceived that this would be the result as no Power would be under obligation to make any other agreements unless it saw fit to do so, or to treat the special agreement as a precedent except in a case precisely analagous, and there could be inserted in the special agreement any statement or qualification that might be deemed to be advisable to show that it was definitely limited to the particular situation in view.

In relation to Lord Curzon's further suggestion, it may be stated that while the proposed treaty could not be ratified until the Senate convenes, and while the Secretary of State is not in a position to give an assurance either with respect to the action of the Senate, or with regard to the prospect of securing from Congress an amendment to the Volstead Act in relation to ship liquor and cargo liquor destined for foreign ports, it is believed that the solution of the present difficulty through the making of a fair and reasonable agreement, such as is proposed, would be the most promising method of securing early action. Therefore, Mr. Hughes trusts that the suggestion will not be put aside upon the supposition that another course is equally feasible.

With respect to Lord Curzon's suggestion that even if the twelve-mile limit were accepted, cases would inevitably occur liable to cause serious fric-

tion between the two countries owing to the difficulty of deciding with any certainty the position of a vessel usually out of sight of land, at any rate on the Atlantic coast, it is believed by this Government that the proposed special agreement would do much to reduce, if indeed it would not wholly eliminate, the causes of friction due to the present efforts to evade the laws of the United States. In this connection, it must be emphasized that the proposed agreement would not interfere with British vessels engaged in legitimate commerce and bound for American ports. Such vessels will necessarily come not only within twelve miles but within three miles of the American coast and will hence in any event be subject to examination by American authorities and will, of course, comply with the applicable laws of the United States. The proposed special agreement would bear only upon those vessels which come within twelve miles but hover off the three-mile limit for the purpose of aiding in the smuggling of intoxicating liquor, or other prohibited articles, into the territory of the United States.

It is impossible for this Government not to take all proper and lawful measures to prevent this illicit traffic from being carried on. An illustration is afforded by the case of the schooner *Henry L. Marshall,* the conduct of which recently came under the scrutiny of the United States Circuit Court of Appeals for the Second Circuit, as stated in the memorandum of the Secretary of State delivered to the British Embassy on the sixteenth instant. While it is understood that this vessel is not regarded as a British vessel, for the reason which His

Majesty's Government has stated, reference may be made to the practice of the vessel as showing the conditions with which the American Government is required to deal. The vessel did not come within the three-mile limit, but she made her arrangements for the carriage of her illicit cargo to the shore of the United States in violation of its laws, and, as the court found, while the unloading was begun outside the three-mile limit, it was continued within the territorial waters of the United States, and the vessel was engaged contrary to the laws of the United States in introducing her cargo of intoxicating liquors within the commerce of the United States.

This Government has already expressed the hope that the British Government will interpose no obstacles in such cases to the enforcement of the laws of the United States, but it is believed that an appropriate agreement which would not injure bona fide trade but would facilitate the enforcement of the laws of the United States in preventing the smuggling of liquor would remove occasions for misunderstanding and eliminate the serious friction to which the Memorandum under consideration refers.

It may confidently be asserted that there would be no disposition on the part of the American authorities, and the special agreement would not justify any attempt, to seize a British vessel, save within the limits proposed, and when it was clear that the vessel concerned was directly involved in an attempt to introduce its illicit cargo into the territory of the United States. British vessels bound for the ports of the United States would en-

counter no additional obstacles to their trade, and vessels destined for foreign ports, which happened to pass on legitimate errands within twelve miles of the American coast, would suffer no inconvenience, while such vessels as were engaged in the unlawful conduct above described would not be able to create difficulties between the two countries, much less serious friction, by attempts to secure immunity for their operations by invoking the protection of the British flag.

Although the Government of the United States regards the proposed agreement as an appropriate setting forth of the proposal, it would cordially welcome the cooperation of the British Government in moulding the form of an arrangement which would reasonably serve a purpose which, it is firmly believed, may be found to be common to both countries.

APPENDIX L

THE BRITISH CHARGÉ D'AFFAIRES AD INTERIM TO THE ACTING SECRETARY OF STATE

BRITISH EMBASSY,

No. 797. *Washington, September 17, 1923.*

SIR: With reference to the note verbale which the Secretary of State addressed to me on July 19th last, I have the honour to inform you, by instruction of His Majesty's Principal Secretary of State for Foreign Affairs, that Lord Curzon has had under careful consideration, in consultation with the other departments of His Majesty's Government concerned, Mr. Hughes's proposals for an extension of territorial jurisdiction in connection with the liquor traffic from the ordinary three-mile limit of territorial waters to a distance of twelve miles from the coast, as embodied in the draft treaty handed to me by the Secretary of State on June 11th last.

The object of the United States Government in making these proposals is to secure the right to search and arrest ships from which spirituous liquors are sold just outside the present limit of territorial jurisdiction. The extent of this traffic seems, however, to His Majesty's Government to have been exaggerated, judging from the following statement published by Mr. Haynes, the United States Prohibition Commissioner in the "New York Times" of July 18th last.

> The moonshine-still is the bootlegger's chief source of supply. From what other

> place can he get his liquor in quantity? Surely not from the rigidly controlled bonded warehouses—they are eliminated at once. As to smuggled liquor, some it is true is brought into the country, but not one-tenth as much as the illegal traffic would have us believe.
>
> When reports of huge smuggling operations are circulated it should be remembered that the illicit liquor interests are conducting a great and elaborate propaganda campaign to discredit law enforcement and that the spreading of such reports is part and parcel of that campaign. No bootlegger, of course, is willing to admit that he can obtain only adulterated moonshine. Hence, fanciful tales of the wet wave sweeping in on our coasts and other related falsehoods pass from mouth to mouth to hide the real and dangerous origin of what the bootlegger has to sell.

In face of this authoritative pronouncement Lord Curzon feels additional hesitation in accepting proposals which, with all due respect to Mr. Hughes, can not, in Lord Curzon's opinion, fail to weaken the authority of the general rule of international law, whereby three miles is regarded as the limit of territorial jurisdiction. Moreover, the Atlantic coast line of the United States, except the small part between Portland (Maine) and the Bay of Fundy, is so low that it is not as a rule visible twelve miles out at sea; the difficulty of deciding the exact position of the proposed new limit would in consequence be much increased, and there would be a constant risk of disputes arising between the two countries whenever a British ship was boarded or arrested by the United States preventive service, on

or near the new line. In this connection Lord Curzon would observe that the ancient British Hovering Acts were modified in 1876 to bring them into harmony with the principles of international law, and His Majesty's Government can not admit that the municipal legislation of any country can override those principles.

No spirituous liquors are cleared direct from the United Kingdom to United States ports and so far as British subjects are concerned, there is no violation of any law, British or international, in the sale of such liquors on the high seas to purchasers of any nationality; therefore there is no obligation upon His Majesty's Government to interfere with the prosecution of a perfectly legitimate trade. Nevertheless the whole question has been carefully examined with an earnest desire to afford the United States Government any proper assistance in the difficulties which they are encountering in the enforcement of the Volstead Act. In this spirit legislation was considered with a view to prohibiting the export of spirituous liquors to destinations adjacent to the United States except under licence or to rendering illegal the discharge of such liquors at ports other than those to which they were originally consigned. It became apparent, however, that such legislation would necessitate and could indeed only be made effective by rationing supplies not merely to countries adjacent to the United States, but to all countries, for which purpose powers would be required similar to those exercised for the control of trade during the war. The United States Government will probably agree that His Majesty's Government could hardly

be expected to revive such powers, seeing that the United States Government themselves (in March, 1920) explained their inability to ratify the convention for the control of the arms traffic on the very ground that they were not prepared to revive the war regulations by which alone a private trade could be regulated.

Assuming, however, that measures could be devised for stopping the export from the United Kingdom of spirituous liquors which might ultimately reach the United States and that all other countries were prepared to take similar action so that the traffic would not merely be diverted into other channels, His Majesty's Government would still feel great hesitation in proposing such measures to Parliament so long as British ships are prevented from carrying liquor under seal in transit through United States waters. As far as His Majesty's Government are aware, it has never been alleged that any liquor at all has made its way into the United States from the stores of British ships calling at United States ports, so that this restriction, besides constituting in effect an interference with the liberty of British ships on the high seas, appears to be entirely superfluous.

His Majesty's Government do not deny the strictly legal right of the United States or any other country to impose it jurisdiction on all ships whether national or foreign within its territorial waters. His Majesty's Government themselves claim that right and it is even the case that some of the provisions of the British Merchant Shipping Acts are such that ships visiting ports in the United Kingdom must comply with them before entering

and after leaving the jurisdiction. These provisions, however, relate solely to the safety and welfare of the ship, crew, and passengers. Similar provisions exist in the legislation of the United States and other countries and they are generally recognised as reasonable.

It is, however, equally well recognized that the circumstances of ships, travelling as they do from port to port in many different countries, are peculiar, and that to subject them to all the different and often conflicting requirements of the various jurisdictions which they may enter, would create an impossible situation. Consequently, as a matter of international comity and practice, the maritime Powers refrain from imposing their jurisdiction on foreign ships except for the purposes stated above, namely the safety and welfare of the ships, crews, and passengers. The principle was well stated in the despatch of 28th October, 1852, from Mr. Conrad, when Acting Secretary of State, to the United States minister at Madrid, wherein he writes:

> You will state that this government does not question the right of every nation to prescribe the conditions on which the vessels of other nations may be admitted into her ports. That nevertheless those conditions ought not to conflict with the received usages which regulate the commercial intercourse between civilized nations. That those usages are well known and long established and no nation can disregard them without giving just cause of complaint to all other nations whose interests would be affected by their violation.

The United States Government have indeed given recent proof of their fidelity to the same principle,

in exempting ships trading between the United States and Italy from the strict application of the Volstead Act, on the ground that Italian law requires the provision of a certain amount of liquor on such ships.

In informing you of the above I am directed to express the earnest hope that means may be found to modify the present application of the Volstead Act to British ships, and thus to remedy what is, in effect, an unwarrantable interference with the domestic concerns of British ships on the high seas.

I am to add that in view of the difficulties of the case His Majesty's Government could not agree to an extension of the three-mile limit, even for a limited purpose, until the matter has been submitted to the Imperial Conference, which will meet within a few weeks in London.

I have (etc.)

H. G. CHILTON.

APPENDIX M

The British Chargé d'Affaires to the Secretary of State

British Embassy,
Washington, D. C., November 23, 1923.

No. 1005.

Sir: In my note to the Acting Secretary of State, No. 797, of September 17th, I had the honour to explain some of the serious difficulties felt by His Majesty's Government in agreeing to the proposals embodied in the draft treaty for the regulation of the liquor traffic which you handed to me on June 11th.

I informed Mr. Phillips in that note that various Departments of His Majesty's Government who would be concerned with the changes which such a treaty must necessarily bring about were engaged in exploring every avenue by which they might lend assistance to the Government of the United States in the obstacles they were encountering in the enforcement of the Volstead Act.

Further sympathetic consideration has been given to the whole matter in the meantime, but I am instructed to state that the attention of His Majesty's Government has been called to an important judgment of the Supreme Court of the United States handed down on April 23rd last, which seems to raise an additional difficulty that must be overcome before a treaty can be drafted in final form.

In delivering that judgment Mr. Justice Van Devanter said:

> While the construction and application of the National Prohibition Act is the ulti-

> mate matter in controversy, the Act is so closely related to the eighteenth Amendment, to enforce which it was enacted, that a right understanding of it involves an examination and interpretation of the Amendment. The first section of the latter declares,
>
> SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited.

He then proceeded to show that the Volstead Act correctly carries out the intention of the eighteenth Amendment, and then that the proper interpretation of the Act is that no ship, domestic or foreign, can carry liquor in transit within United States territorial waters. That is to say, such carriage of liquor appears to be not merely illegal but unconstitutional.

Lord Curzon was glad to receive and has weighed with the greatest care the communications you have been good enough to make to him both through the late United States Ambassador in London and through me regarding the constitutionality of the proposed treaty, and he has not overlooked the announcement made to the Press on November 2d by the President of the United States to the effect that, as Congress specifically exempted from the operation of the Act liquor in transit through the Panama Canal, it thereby recognised that the right of foreign ships to transport liquor in United States waters is not prohibited by the Constitution but merely by the Act, and that the Act can be modified by a treaty. In view, however, of the

great importance of this point Lord Curzon would be glad to receive information as to whether the right to carry liquor through the Panama Canal has ever been challenged on constitutional grounds and confirmed in the United States Courts. It has been represented to him that in the absence of such confirmation the precedent set by the legislators in the Volstead Act can not be regarded as entirely conclusive.

Resolutions adopted at recent important gatherings in the United States of business men interested in the American Mercantile Marine give foundation for the belief that legal steps may be taken in the future to question the constitutional validity of the concession which the treaty proposes to grant to British ships trading with United States ports. Should that concession be so questioned and not confirmed by the Courts, His Majesty's Government would lose the privilege in return for which they are asked to make a very important concession in relation to the right of arrest and search.

As at present advised it appears to Lord Curzon impossible to proceed with the treaty or any similar arrangement until His Majesty's Government have been favoured with authoritative assurances on this point by the Government of the United States.

I have the honour to be, with the highest consideration, Sir,

Your most obedient, humble servant,

H. G. CHILTON.

The Honourable CHARLES E. HUGHES,
Secretary of State of the United States,
Washington, D. C.

APPENDIX N

THE SECRETARY OF STATE TO THE BRITISH CHARGÉ D'AFFAIRES

NOVEMBER 26, 1923.

SIR: I have the honor to acknowledge the receipt of your note, No. 1005, of November 23, 1923, and I am gratified to observe the sympathetic consideration that His Majesty's Government is giving to the proposals embodied in the draft treaty.

It is hardly necessary to say that in these proposals there has been no intention to violate in any respect the provisions of the Eighteenth Amendment of the Federal Constitution. On the contrary, the purpose is to aid their enforcement.

In the case of the *Cunard Steamship Company, Ltd. et al.* v. *Mellon, Secretary of the Treasury, et al.* (decided April 30, 1923), to which you refer, the question of the validity of an Act of Congress, or a treaty, excepting from penalty or forfeiture intoxicating liquor carried as cargo or sealed stores not destined for delivery or consumption within the territory of the United States, but carried under seal while in transit through territorial waters, was not involved, and that decision can not be regarded as determining that question. In that case it was held that Congress, acting within its authority, had actually imposed penalties upon such carriage, and an injunction restraining the officers of the Govern-

ment from proceeding against the complaining steamship companies and their ships, under the Act of Congress as thus construed, was denied.

While the precise question raised in your note has not been decided, there are certain applicable principles which are deemed to be controlling. The Eighteenth Amendment provides:

> I. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> II. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

It is apparent that the first section provides no penalties and that these are left to appropriate legislation. As the Supreme Court of the United States has recognized, a constitutional provision "is self-executing only so far as it is susceptible of execution." (*Davis* v. *Burke,* 179 U. S. 399, 403.) As no penalties or forfeitures are prescribed in the Eighteenth Amendment itself, and Congress is empowered to enforce that Amendment by appropriate legislation, it is manifest that to the sound discretion of Congress is confided the determination of what are appropriate penalties and forfeitures. In the judgment of this Government there is no reason to doubt that in the exercise of this authority Congress may consider all the pertinent circumstances and the best means of enforcing the constitutional provision, and may thus consider it en-

tirely appropriate not to impose penalties or forfeitures with respect to intoxicating liquor which is not destined for consumption or delivery within the United States but is simply carried in transit through territorial waters.

The authority which is thus deemed to be possessed by Congress has already been exercised with respect to the transit of intoxicating liquors through the Panama Canal. There is a special provision in the Volstead Act dealing with the Canal Zone which excepts "liquor in transit through the Panama Canal or on the Panama Railroad." It is true that the validity of this exception has not been the subject of precise adjudication, but it is believed to have been fully recognized by the Supreme Court in the decision which you have cited in your note. The Supreme Court there said:

> Much has been said at the bar and in the briefs about the Canal Zone exception, and various deductions are sought to be drawn from it respecting the applicability of the Act elsewhere. Of course the exception shows that Congress, for reasons appealing to its judgment, has refrained from attaching any penalty or forfeiture to the transportation of liquor while "in transit through the Panama Canal or on the Panama Railroad." Beyond this it has no bearing here, save as it serves to show that where in other provisions no exception is made in respect of merchant ships, either domestic or foreign, within the waters of the United States, none is intended.
>
> Examining the Act as a whole, we think it shows very plainly, first, that it is intended to be operative throughout the territorial

limits of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to apply to domestic vessels when outside the territorial waters of the United States, and, thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise.

It will be observed that the exception is not criticized nor is it said to lie beyond the power of Congress, but it is stated that the exception shows "that Congress, for reasons appealing to its judgment, has refrained from attaching any penalty or forfeiture" to the transportation described.

It is the view of this Government that Congress has the same authority to except from penalties or forfeitures intoxicating liquor in transit through territorial waters not destined for delivery or consumption within the United States that it has to except from penalty or forfeiture intoxicating liquor in transit through the Panama Canal. Moreover, if Congress made such an exception, it is manifest that there would be no penalty or forfeiture attaching to such transit.

It is also the view of this Government that as the Constitution does not deal with penalties or forfeitures, and these remain within the law-making power, this subject can not be regarded as withdrawn from the treaty-making power. The treaty-making power is deemed to be quite as broad in this respect as the legislative power. As was said by the Supreme Court of the United States in the case of *Missouri* v. *Holland,* 252 U. S. 416, 433:

> Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.

You will not fail to observe that the part of the proposed treaty above mentioned relates only to exception from penalties and forfeitures in the particular circumstances described in the treaty and that the treaty as a whole is clearly intended to secure the better enforcement of the Eighteenth Amendment by facilitating measures to prevent the operations which have seriously interfered with that enforcement. The provisions with respect to arrest and search are to be considered in connection with the exception from penalty or forfeiture in case of liquors merely in transit.

I have, therefore, no hesitation in saying that while this Government is clearly of the opinion that the proposed treaty would have constitutional validity, there would be no attempt on the part of this Government to insist upon the provisions as

to arrest and search in opposition to the desire of His Majesty's Government to abrogate the treaty in case the proposed exception from penalty and forfeiture should either by final judicial decision or by Act of Congress become inoperative. Such abrogation would, of course, not be deemed to impair any rights possessed by this Government irrespective of the treaty.

Accept, Sir, the renewed assurance of my high consideration.

CHARLES E. HUGHES.

711.419/61.

Mr. HENRY GETTY CHILTON,
Chargé d'Affaires ad interim
of Great Britain.

APPENDIX O

Draft Treaty. Left with the Secretary of State by Mr. Chilton, British Chargé d'Affaires, December 3, 1923

1. The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles measured from low water mark constitute the proper limits of territorial waters.

2. (1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavouring to import or have imported alcoholic beverages into the United States in violation of the laws in force in that country. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States than can be traversed in one hour by the vessel suspected of endeavouring to commit the offence. In cases, however, in which the liquor is intended to be conveyed to the United States by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

3. The United States agrees to allow British vessels voyaging to or from the ports or passing through the waters of the United States to have on board alcoholic liquors listed as sea stores or as cargo destined for a foreign port, provided that such liquor is kept under seal while within the jurisdiction of the United States.

4. Any claim by a British vessel for compensation on the ground that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by article 2 of this treaty or on the ground that it has not been given the benefit of article 3 shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington on August 18, 1910, but the claim shall not, before submission to the Tribunal, require to be included

in a schedule of claims confirmed in the manner therein provided.

5. This treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

Three months before the expiration of the said period of one year, either of the High Contracting Parties may give notice of its desire to propose modifications in the terms of the treaty.

If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the treaty shall lapse.

If no notice is given on either side of the desire to propose modifications, the treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the treaty, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the treaty shall lapse.

6. In the event of either of the High Contracting Parties being prevented by difficulties of a constitutional nature from giving full effect to the provisions of the present treaty, the said treaty shall automatically lapse.

APPENDIX P

Aide Mémoire by the Secretary of State Handed to the British Chargé d'Affaires

December 7, 1923.

The Secretary of State has carefully considered the draft proposed by His Majesty's Government of the treaty relating to alcoholic liquors. While the Government of the United States would have preferred that the distance for the purposes of search and seizure be more definitely delimited, it has been concluded, in view of the evident desire of the British Government to attain the object in view and of the importance of an early disposition of the matter, not to raise objections to the provisions contained in Articles 2, 4, and 5 of this draft, save to add the words ", its territories or possessions" after the words "United States" in Article 2.

There are, however, certain modifications in the other articles which are deemed to be important.

Article I

In order to avoid a detailed statement with respect to ports, bays, harbors, et cetera, it is desired that in Article I after the words "three marine miles" there should be inserted the words "extending from the coast line outward and", so that Article I shall read as follows:

> I. The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending

from the coast line outward and measured from low water mark constitute the proper limits of territorial waters.

Article 3

In the communication addressed by the Secretary of State to the British Chargé d'Affaires ad interim under date of November 26, 1923, the question of the constitutional validity of the proposed treaty was considered and it was pointed out that the lawmaking power of Congress and the treaty-making power were deemed to extend under the Eighteenth Amendment of the Federal Constitution to the determination of penalties or forfeitures and such exceptions thereto as might be deemed to be appropriate in view of all the pertinent circumstances and after consideration of the best means of enforcing the constitutional provision. It is important, however, that the provision of the treaty upon this point should clearly reflect this view and should relate to an exception from penalties and forfeitures. To leave no room for question as to the intent, it is deemed advisable to refer to the existing exception in the case of transit through the Panama Canal. For these reasons the Government of the United States proposes that Article 3 of the proposed treaty shall be amended to read as follows:

> 3. No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors, or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States its territories or posses-

sions on board British vessels voyaging to or from ports of the United States or its territories or possessions, or passing through the territorial waters thereof, and such transit through such waters shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.

Article 6

While the Government of the United States would have preferred that the treaty should be subject to denouncement in the event under consideration, it is understood that His Majesty's Government strongly desire not to have a provision for denouncement but instead to have a provision for the automatic lapsing of the treaty in the event described. The Government of the United States will not oppose this view; but it is deemed that there should be a modification of the text of the proposed article in the following particulars. The expression "difficulties of a constitutional nature" is thought to be too indefinite. Such difficulties, if they arose, would be presented by a judicial decision upon the question and it is desired that the reference should be not to "constitutional difficulties" but to "judicial decision" which would prevent giving full effect to the provisions of the treaty. Moreover, there is also the question of legislation subsequently enacted by Congress and this

contingency, while deemed to be remote, should be covered by the article. It is also desired to have a specific statement as to the full retention of rights on the termination of the treaty. For these reasons it is proposed that Article 6 shall read as follows:

> 6. In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present treaty, the said treaty shall automatically lapse, and, on such lapse or whenever this treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this treaty not been concluded.

It is hoped that with these modifications the treaty as proposed may be concluded at an early date.

DEPARTMENT OF STATE,
Washington.

APPENDIX Q

THE BRITISH CHARGÉ D'AFFAIRES TO THE SECRETARY OF STATE

BRITISH EMBASSY,
Washington, D. C., January 2, 1924.

No. 5—Urgent.

SIR: Under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, I have the honour to draw your attention to certain statements made on behalf of the President of the United States and reported by the correspondents of the Morning Post and Daily Telegraph in Washington to those newspapers in England, in regard to the attitude of the United States Government in the matter of the seizure, outside the three-mile limit, of foreign vessels which are suspected of acting in violation of the Prohibition Law. According to these reports the view of the President is stated to be

> that the United States have never relinquished the right to seize ships whether within or without the three-mile limit which have discharged their cargoes in violation of United States law.

The Daily Telegraph further reported that

> At the White House the statement is authorised that the President believes that the "Tomoka" case comes under the scope of the decision of the United States Circuit Court

for Appeals in New York in the case of the "Henry L. Marshall" captured nine miles off shore. In that case, the Presidential spokesman pointed out that the "Henry L. Marshall" was discharging liquor cargo and was in contact with the shore. The British Government protested in the "Marshall" case, but withdrew its protest when it was shown that the registry of the vessel was defective.

If the above reports are correct it would appear that the President of the United States now reasserts the claim of the United States Government to seize foreign ships outside the three-mile limit if they have established contact with the shore for illegal purposes. His Majesty's Government realize that in August last Judge Woodrough in the Federal District Court at Brookyln upheld the seizure of a British vessel outside the three-mile limit on the grounds that she was hovering off the American coast for smuggling purposes and had had contact with the shore. His Majesty's Government are not, however, aware that the Supreme Court have yet considered Judge Woodrough's judgment, and His Majesty's Government have therefore been under the impression that the previous policy of the United States Government not to seize foreign vessels outside the three-mile limit, which was adopted before that judgment, still held good. In these circumstances and in order to clear up the present ambiguous situation, I have been instructed by my Government to ask you to be so good as to communicate to me, at your earliest convenience, an authoritative statement as to the present policy of the United States Government on this question.

At the same time His Majesty's Government desire me to point out that the statement emanating from the White House, above referred to, in connection with the *Henry L. Marshall case* seems to imply that the United States Government infer that the absence of a protest by His Majesty's Government against the seizure of the *Henry L. Marshall* showed that His Majesty's Government acquiesce in the seizure of British vessels outside the three-mile limit. But I would remind you that it was precisely in order to eliminate any such inference or any doubt on the part of the United States Government as to the attitude of His Majesty's Government in regard to the principle involved that I addressed to you my note No. 578 of July 10th last.

As the United States Government still appear to be under some misapprehension on this point, I have been instructed by my Government to reaffirm their position as explained in my note above-mentioned and to state that the absence of a protest by His Majesty's Government in the case of the *Henry L. Marshall* did not mean that they acquiesce in seizures outside territorial waters, that, on the contrary, the position of His Majesty's Government remains unchanged on the question of principle, and that they still regard such seizures as creating a serious situation.

Having made clear to you the attitude of His Majesty's Government, I have the honour to emphasize the importance which they attach to being informed as soon as possible of the policy of the United States Government on this question, especially in view of a further case of the seizure

by the United States authorities of a British vessel on the high seas having recently arisen. The case to which I refer is that of the British schooner *Tomoka*. This vessel was seized by the United States authorities on November 24th about six miles from the shore The *Tomoka* was first registered at Nassau, Bahamas, on April 24th, 1921, and was again registered there when an auxiliary engine was installed on March 30th, 1923. The *Tomoka* was originally owned by the British Transportation & Trading Company of Nassau, but was sold in January, 1923, to the Ocean Trading Company of Halifax, Nova Scotia, the present owners of the vessel. The Ocean Trading Company is a Canadian Company, incorporated under the laws of Nova Scotia, and the President and Secretary of the Company are Canadian subjects. I am informed that at the time of the seizure of the *Tomoka* her crew included seven British subjects. Although more than four weeks have passed since the seizure occurred, I understand that the vessel is still detained and the crew held under bond by the United States authorities at New York.

I have been instructed by my Government to enquire the reasons for the action of the United States authorities in pursuing and seizing this British vessel and her British crew on the high seas and in detaining them in New York, and further to ask that if the facts are as stated above you will be so good as to cause the competent authorities to take steps to effect the release of the British members of the crew without delay.

I have the honour to request the favour of an early reply not only as to the specific case of the

Tomoka but also as to the general question of the present policy of the United States Government in the matter of the seizure of foreign vessels outside the limit of United States territorial waters. I have the honour to be with the highest consideration, Sir,

Your most obedient, humble servant,

HWB/Mc. (Signed) H. G. CHILTON.

The Honourable CHARLES E. HUGHES,
Secretary of State of the United States,
Washington, D. C.

APPENDIX R

THE SECRETARY OF STATE TO THE BRITISH AMBASSADOR

JANUARY 22, 1924.

EXCELLENCY: I have the honor to acknowledge the receipt of Mr. Chilton's note No. 5, dated January 2, 1924, concerning the seizure of British vessels engaged in smuggling liquor into the United States from outside the three-mile limit. Mr. Chilton referred to reports published in British newspapers concerning statements made on behalf of the President of the United States respecting such seizures, and he requested an authoritative statement as to the policy of the United States Government on this question.

He referred to his note No. 578 of July 10, last, concerning the seizure of the schooner *Henry L. Marshall* while operating under the British flag outside the three-mile limit of the United States, and stated that "absence of a protest by His Majesty's Government in the case of the *Henry L. Marshall* did not mean that they acquiesce in seizures outside territorial waters, that, on the contrary, the position of His Majesty's Government remains unchanged on the question of principle, and that they still regard such seizures as creating a serious situation." As has been observed before, I have taken it for granted that your Government did in fact make protest of the seizure of the *Henry L. Mar-*

shall through your notes of August 11 and September 9, 1921.

It is far from my purpose to enter into a detailed review of the correspondence with your Embassy concerning the several cases of seizure which have arisen. I would merely advert briefly to certain facts which, it is believed, suffice to explain the position of my Government:

First: I endeavored to state succinctly the principles on which my Government has asserted rights of seizure and condemnation in my note to your Embassy of July 16, last, concerning the case of the *Henry L. Marshall.*

Secondly: The desire which I expressed in the last paragraph of that note for an indication of the disposition of His Majesty's Government as to the espousal of the cause of a British merchant vessel engaged in an effort unlawfully to introduce intoxicating liquors into the territory of the United States in the manner adopted by the schooner *Henry L. Marshall* has, as yet, met with no response on the part of His Majesty's Government.

As Mr. Chilton made special inquiry with reference to the facts and conditions surrounding the case of the *Tomoka,* I take pleasure in setting forth at length for the confidential information of your Government, what official investigations have revealed.

The *Tomoka* was formerly the American yacht *Arethusa* owned by William F. McCoy. With reference to Mr. Chilton's statement that the *Tomoka* was first registered at Nassau, Bahama Islands, on April 24, 1921, I may state that the sale of the schooner-yacht *Arethusa,* Official No. 204604, by

William F. McCoy to Charles E. Albury, with change to British registry was authorized by the United States Shipping Board on April 25, 1921. The *Arethusa* was first registered under the British flag on June 6, 1921, with Charles Eugene Albury, an impecunious British subject temporarily residing at Miami, Florida, named as owner. A mortgage on the schooner for two thousand pounds, dated May 28, 1921, from Charles E. Albury, to William F. McCoy of West Palm Beach, Florida, was placed on record at Nassau on June 7, 1921. A discharge of the mortgage for two thousand pounds given by Mr. Albury to William F. McCoy, dated April 11, 1922, was recorded at Nassau on April 13, 1922. I understand that no steps were taken to obtain the approval of the Board of Trade in compliance with the provisions of the British Ships (Transfer Restrictions) Act of August 23, 1916, a copy of which was enclosed with Mr. Chilton's note No. 907, dated October 24, 1923.

By a bill of sale dated March 14, 1922, and recorded at Nassau on April 13, 1922, the *Arethusa* was transferred by Charles E. Albury to the British Transportation and Trading Company, Limited, Nassau. The information I had received regarding the American ownership of this company was set forth in the note I addressed to you on February 26, 1923, and I inquired whether, in case it was found that the actual interest in the company was American, your Government would be disposed to take any steps to prevent the use of the British flag on ships belonging to the company for the purpose of avoiding seizure of its vessels by the agents of the United States for violation of its laws. In

his note No. 907, dated October 24, 1923, Mr. Chilton replied as follows:

> As to (1) in March and April last a thorough investigation was made into the status of the British Transportation and Trading Company by the appropriate authorities in the Bahamas, and it was ascertained that the Company was incorporated in Nassau on November 30th, 1921, and that the following persons comprised the directorate thereof: William Frederick McCoy, President; Maud McCoy (wife of William F. McCoy), Treasurer and Secretary; Peter Diamond and Bruce Kilroy Thompson. As far as is known, all of these persons, with the exception of the last named, were American citizens. At the time the investigation was made the Company had, however, no vessels registered at Nassau, their only vessel (the *Tomoka,* official No. 151267) having lately been sold to the Ocean Trading Company of Halifax, Canada. In these circumstances His Majesty's Government are of the opinion that the question raised in your note under reply and quoted under (1) ceased to be of practical interest.

With respect to the Ocean Trading Company, the alleged present owner of the schooner *Tomoka,* to whom you state it was sold in January, 1923, and which you state is a Canadian Company incorporated under the laws of Nova Scotia, the President and Secretary being Canadian subjects, I may state that information has been received that the Ocean Trading Company, Limited, was incorporated on January 30, 1923, under the Nova Scotia Companies Act. I enclose a copy of the "Mem-

orandum of Association of Ocean Trading Company, Limited." I also enclose a copy of an agreement dated January 30, 1923, between the British Transportation and Trading Company, Limited, of Nassau, and the Ocean Trading Company, Limited, of Halifax, whereby the schooner *Tomoka* with all her gear, stores and other effects was transferred to the Ocean Trading Company. Your attention is invited to the fact that Article 2 of the Agreement reads as follows:

> The consideration of the said sale shall be $50,000.00, which shall be paid and satisfied as follows: As to $300.00 by payment of that amount in cash and as to the balance of $49,700.00, by the allotment to the vendor or their nominees, of 497 fully paid shares in the capital stock of the Company of the par value of $100.00 each.

I am informed that the Nova Scotia Companies Act provides as follows:

> Any three or more persons associated for any lawful purpose other than a banking, a loan, a trust or an insurance company, may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.

You will observe that in this case there was, therefore, a bare technical compliance with the law, as the Memorandum of Association was signed by three persons, each of whom held, or appeared to hold, one share in the Company.

I also understand Part IV, paragraph 74, of the Nova Scotia Companies Act requires every company to keep at its registered office, "a register

containing the names and addresses, and the occupations of its directors or managers," and to "send to the Registrar, a copy thereof, and from time to time notify to the Registrar any change among its directors or managers." It is stated that the Company has not complied with this section of the law.

The Nova Scotia Companies Act also is said to require the Company to keep at its registered office a register of its members, with certain particulars, which register "shall, during business hours * * * be opened to the inspection of any member gratis, and to the inspection of any other person on payment of twenty-five cents, or such less sum as the Company may prescribe, for each inspection." When request was made for permission to examine the register of members at the registered office of the Company, 605–609 Barrington Street, Halifax, Mr. Fred M. Morris, who signed the agreement above mentioned as President of the Ocean Trading Company, stated that he was not a member of the Company. I am informed that the public records showed him to be a member and gave that address as the registered address of the Company. He replied, on the advice of his employer, Mr. Howard Wentzell, that the register of the Company was in the hands of their attorneys, and that he would at once take up the matter with them. Subsequent inquiry at the office of McLean, Burchell and Ralston, Attorneys, brought forth the statement that they had acted only in the incorporation of the Ocean Trading Company, Limited, that they had no register of the employees and did not care to be concerned in the matter. Inquiry was also made of

Mr. E. M. Ritcey, who is accorded as Secretary of the Company, but he stated that he had no register of the Company and that he was no longer a member of it, having sold his one share the same date he acquired it.

The address given in the public records as the registered place of business of the Ocean Trading Company, Limited, is, in fact, the place of business of Howards, Limited, wholesale brokers and ship chandlers. Fred M. Morris, E. M. Ritcey, and Fred C. Worrigan, whose signatures appear on the Memorandum of Association above mentioned, are clerks employed by Howards, Limited. Furthermore, I am informed that McCoy requested Mr. Wentzell, to recommend a firm of attorneys to draw up some papers, and that Mr. Wentzell sent him to McLean, Burchell and Ralston, and it is stated that a member of that firm suggested the young men in the store of Howards, Limited, as incorporators for the Company McCoy wished to form. It seems clear that the President and Secretary of the Ocean Trading Company referred to in Mr. Chilton's note are merely figureheads, that the Company has failed to comply with the laws of Nova Scotia in several respects, and that it is evidently an organization formed merely to cloak the actual operation of the *Tomoka* by McCoy under the British flag. The foregoing facts surrounding the case compel the conclusion that the vessel was in realty an American ship and justified the authorities of this Government in dealing with it as such.

Reference is made in this connection to the judgment of the Lords of the Judicial Committee of the Privy Council concerning the condemnation of the

steamships *Kankakee, Hocking* and *Genesee,* operated under American registry and claimed by the American Transatlantic Company, a company organized under the laws of the State of Delaware. The judgment was delivered on July 23, 1920, and is reported in Lloyd's List Law Reports, Trinity Sittings, 1920, Volume 4, Page 355. The Privy Council found that the American Transatlantic Company was controlled and financed from Germany, and that the steamers were, therefore, liable to condemnation.

The conduct of persons on board the *Tomoka* prior to its seizure is illustrated by the fact that on August 22, 1923, shortly before ten o'clock, p. m., the *Tomoka* opened fire on a motor boat belonging to the Coast Guard cutter *Manhattan,* while on patrol duty off the entrance to New York Harbor. Just before opening fire a searchlight was turned on the boat clearly illuminating it and the men in it so that the boat was known to the persons on board the *Tomoka.*

The *Tomoka* was seized six miles at sea off Seabright, New Jersey, on November 24, 1923, having 135 cases of liquor on board. Her clearance from Hamilton, Bermuda, showed that she left the port on November 12, 1923, with 449 cases of liquor. The remaining cases of liquor are understood to have been landed in the United States. At the time of the seizure, McCoy was on board and in active charge of the schooner. After the Coast Guard crew went aboard the *Tomoka* he directed the crew of the *Tomoka* not to go to New York but to go to sea, which they attempted to do. Thereupon the Coast Guard took command of the *Tomoka.* * * *

[Certain immaterial matter relating to an individual omitted in printing.]

With respect to the legal proceedings that have been instituted against the *Tomoka* and the members of her crew, I enclose for your confidential information extracts from the report of the officer in charge of these proceedings. You will observe that no unnecessary delay has occurred in these proceedings and that such delay as has taken place has been due to the refusal of members of the crew to give testimony. I shall keep you informed of further developments in the trial of the case and of the result of it.

In conclusion, I can not refrain from expressing the hope that His Majesty's Government, in view of the facts above set forth, may not feel obliged to regard the *Tomoka* as a British vessel entitled to the protection of the British flag.

Accept, Excellency, the renewed assurances of my highest consideration.

CHARLES E. HUGHES.

His Excellency The Right Honorable Sir AUCKLAND GEDDES, G. C. M. G., K. C. B., *Ambassador of Great Britain.*

Enclosures:

Copy of Memorandum of Association of Ocean Trading Company, Limited.

Copy of Agreement.

Extracts from report.

311.4153 T 59/20.

(Enclosures omitted in printing.)

U. S. GOVERNMENT PRINTING OFFICE: 1938